TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 555

COLUMBIA BROADCASTING SYSTEM, INC.,
APPELLANT,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED NOVEMBER 30, 1942.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 4, 1943.

—3925

[fol. 1]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action, File No. 16-179

Columbia Broadcasting System, Inc., Plaintiff,

vs.

The United States of America, Defendant

Summons

To the above-mentioned Defendant:

You are hereby summoned and required to serve upon John J. Burns, plaintiff's attorney, whose address is 40 Wall Street, New York, New York, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

George J. H. Follmer, Clerk of Court. (Seal of the U. S. District Court.)

Date Oct. 30th, 1941.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

In United States District Court, Southern District of New York

Civil Action, File No. 16-179

Columbia Broadcasting System, Inc., Plaintiff,

vs.

The United States of America, Defendant

Complaint

This is an action to set aside, annul and permanently enjoin the enforcement of certain portions of an order of

the Federal Communications Commission (hereinafter re-[fol. 2] ferred to as "the Commission") denominated "Commission Order in Docket No. 5060 in the Matter of the Investigation of Chain Broadcasting", promulgated on May 2, 1941 and amended on October 11, 1941. Jurisdiction of this action is invoked under the provisions of Section 402(a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C. § 402(a)) as amended, and of the Urgent Deficiencies Appropriation Act (38 Stat. 219, 220; 28 U. S. C. §§ 41(28), 43-48 (1913), inclusive) as amended.

For a cause of action against the defendant, the plaintiff alleges upon information and belief:

First: The plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New York, and has its principal office and place of business in the City, County and State of New York, and within the Southern District of New York.

Second: The Federal Communications Commission is a Commission created by the Communications Act of 1934, and is charged with executing and enforcing the provisions of that law.

Third: The plaintiff is engaged primarily in the business of operating a nation-wide network broadcasting system. The plaintiff and its predecessor company have been engaged in this business since 1927. There are issued and outstanding 1,716,277 shares of the capital stock of plaintiff of the par value of $2.50 each, listed and traded on the New York Stock Exchange, and owned by more than 8,000 stockholders. It has total assets of over $22,000,000, over $18,000,000 of which is devoted directly to network broadcasting. The plaintiff supplies network programs to 123 stations in 122 cities of the country, which programs can be heard by over 90% of the listening audience of the nation. At December 28, 1940 it employed over 1,800 persons regularly, excluding performing artists and musicians. It has entered into long-term contracts and commitments for the use of land and buildings, for the furnishing of news and special program features, and for the employment of musicians, for several years in the future, requiring payments to be made by the plaintiff in excess of $4,000,000. Its earnings from the operation of its network exceeded $3,000,000 in both 1939 and 1940.

[fol. 3] Network broadcasting is an integral and necessary part of the American system of radio broadcasting, and its existence is essential to the fullest and most effective utilization of the radio facilities of the country. Many improvements in engineering, program quality and the general public service rendered by radio are due to the network system of broadcasting. It has been responsible largely for the growth of radio as a medium of public information, education, entertainment, and advertising.

Fourth: The operation of its network by the plaintiff consists essentially of the furnishing of radio programs for simultaneous broadcasting thereof by radio stations to which these programs are transmitted from a central point of origination by means of service over wire telephone lines, contracted for and used by the plaintiff for this purpose. The plaintiff furnishes the stations commercial and sustaining programs. The commercial programs are those sponsored by an advertiser who pays for their broadcasting; the sustaining programs are not paid for by any advertiser, but are furnished by the network. The stations operate solely by virtue of licenses to operate issued by the Commission. Plaintiff furnishes these network programs to 115 such stations pursuant to contracts with such stations. These contracts are known in the broadcast industry as affiliation or outlet contracts, and the stations are known as network affiliates or outlets.

Fifth: Plaintiff's affiliation contracts are, in most cases, in the form shown in Exhibit "A", annexed. The material provisions are substantially as follows:

1. Plaintiff agrees to furnish to the station an average of at least 60 hours per week of network sustaining and sponsored programs.

2. Plaintiff will furnish all available network sustaining programs without charge. It will furnish to the station all commercial programs which the sponsor requests the station to broadcast. In turn, the station will be paid a specified hourly rate for the use of its facilities in broadcasting network commercial programs. Usually this hourly rate paid to the station is graduated upward as specified totals of network commercial hours are successively attained by the station.

[fol. 4] 3. The station will not broadcast programs from any other network, except special events of public importance, from occasional local, state, or regional hook-ups.

4. Plaintiff will not furnish its programs to any other standard broadcast station in the city in which the station is located, except in case of public emergency.

5. The station will, upon not less than 28 days' notice from plaintiff, broadcast the sponsored or commercial programs furnished to it by plaintiff, provided that:

(a) The station need not broadcast such programs for more than 50 "converted hours" (on the average this requires 79 regular clock hours) in any one week,

(b) The station may substitute its own sustaining programs devoted to education, public service, or events of public interest, and

(c) The station may reject any network sponsored program which it deems not in the public interest.

6. The station is free to, but is not required to broadcast the network sustaining programs.

7. The contracts are usually for a term of 5 years with the plaintiff having the right, in some instances, to terminate on 12 months' notice.

Sixth: These contracts constitute a relationship between the plaintiff and the affiliated stations which is and has been valuable and advantageous to both. The provisions of the contracts alleged in Paragraph Fifth are indispensable to the efficient operation of the plaintiff's business. They are necessary and essential for the creation and maintenance of the plaintiff's identity as a network and of its public goodwill. They are necessary to enable plaintiff to compete with printed media such as magazines and other publications of national circulation, outdoor advertising and the like. Agreements of this character between networks and outlet stations are indispensable to the existence of a strong and efficient system of network broadcasting. They assure a better, fuller and more effective use of the radio facilities of the nation than any system of network broadcasting without them.

[fol. 5] Seventh: On May 2, 1941 the Commission issued a report, and the order which, as amended, is complained of

in this action. The original order was designated "Commission Order in Docket No. 5060 In the Matter of the Investigation of Chain Broadcasting, May 2, 1941". The amendment to the said order of May 2, 1941 was made by an order which the Commission issued on October 11, 1941. On the latter date the Commission also issued a supplemental report, denominated herein its "Opinion On Rehearing." A copy of the order of May 2, 1941 is hereto annexed and marked Exhibit "B". A copy of the Opinion on Rehearing, the Dissenting Opinion On Rehearing, and the order issued October 11, 1941, is hereto annexed and marked Exhibit "C".

The order of May 2, 1941, as amended by the order of October 11, 1941, promulgated certain Rules, among them the following:

"3.101. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization[1] under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.

"Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

"Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or [fol. 6] understanding express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the

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[1] The term "network organization", as used herein, includes national and regional network organizations.

station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

"Section 3.104. No license shall be granted to a standard broadcast station which options [1] for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours [2] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.[3] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."

3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or under- [fol. 7] standing, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the

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[1] As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

[2] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

[3] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance."

On July 22, 1941 the Commission deferred the effective date of the order of May 2, 1941, with respect to existing contracts, arrangements or understandings, until September 16, 1941. On August 28, 1941 the Commission further postponed the said effective date to a time to be fixed by the Commission. By its order of October 11, 1941 the Commission fixed the said effective date at November 15, 1941:

"It is Further Ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*. That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

The purposes, terms and effect of these Rules are to prohibit station licensees from having agreements of the kind and character alleged in Paragraph Fifth, which are essential to the efficient operation of the system of network broadcasting.

Eighth: The report and order originated in an investigation instituted by the Commission on its own motion into network or chain broadcasting. The Commission authorized the investigation on March 18, 1938 by Order [fol. 8] No. 37, hereto annexed and marked Exhibit "D". On April 6, 1938 a Committee of three Commissioners was appointed by the Commission to supervise the investigation,

to hold hearings in connection therewith, and to make reports to the Commission with recommendations for action by the Commission.

The plaintiff was made a respondent and party to the proceedings in this investigation and together with other respondents was directed to produce evidence on the subject of network broadcasting by a letter of the Commission dated September 20, 1938 annexed hereto and marked Exhibit "E".

Between November 14, 1938 and May 19, 1939 the Committee held legislative hearings pursuant to public notice. On June 12, 1940 the Committee submitted its report to the Commission. In November, 1940, upon invitation of the Commission given at the request of the networks, briefs in the proceeding were filed on behalf of plaintiff as well as other national networks and interested parties, discussing the issues raised by the report of the Committee. On November 28, 1940 the Commission issued a public release, annexed hereto and marked Exhibit "F", announcing oral arguments to be held before the full Commission and directed to the Committee report and to certain draft Rules. The oral arguments before the full Commission were presented by the parties on December 2 and 3, 1940. On January 2, 1941 supplementary briefs were filed on behalf of the nation-wide network organizations discussing the jurisdiction of the Commission with respect to matters covered by the Committee report and the draft Rules.

In the briefs filed in November, 1940, at the oral arguments before the full Commission and in the supplementary briefs, the plaintiff and several other respondents and parties to the proceedings in the investigation urged

1. That the Commission had no jurisdiction to promulgate regulations concerning the matters treated in the Committee Report and the draft Rules;

2. That the customs and practices proposed to be prohibited or restricted by the recommendations of the Committee Report, and the draft Rules, were indispensable to network broadcasting and to the most effective utilization of the radio facilities of the nation; and,

[fol. 9] 3. That the prohibition or restriction of these customs and practices of the industry was not required by and would not serve the public interest, convenience and necessity, was not necessary to carry out the provisions or the

purposes of the Communications Act of 1934, and was in fact contrary to the public interest, convenience and necessity and to the provisions and the purposes of the Communications Act of 1934.

As stated in Paragraph Seventh, on May 2, 1941 the Commission made its report and the order which was later amended.

On August 14, 1941 Mutual Broadcasting System, Inc. petitioned the Commission to amend Rules 3.103 and 3.104. On August 28, 1941 the Commission set the petition down for hearing on September 12, 1941 and ordered at the same time a rehearing upon all the Rules, inviting all parties to present briefs and oral arguments and suggestions, but no further testimony. On September 12, 1941 a full rehearing was had upon briefs and oral arguments. Among other parties appearing, plaintiff filed a statement and its counsel presented oral argument reiterating its former position with respect to the Rules and urging that the Commission set the Rules aside. On October 11, 1941 the Commission issued the Opinion on Rehearing and amended order.

Ninth: Prior to May 2, 1941 stations licensed by the Commission have had a reasonable expectancy of the annual renewal of their licenses, and it has been the practice of the Commission to renew the license of stations annually. The licenses held by such stations having affiliation contracts with plaintiff come up before the Commission for the granting or refusal of a renewal thereof at various times commencing in the immediate future and in no case later than one year from the present. The Commission has determined that it will revoke or deny the renewal of the license of any station having such affiliation contract after the effective date of the Rules referred to in Paragraph Seventh. When their current licenses expire, at the latest, and perhaps at an earlier date through the revocation of their existing licenses before expiration, such stations face the loss of their licenses if they perform or continue in [fol. 10] force or renew any existing contracts containing the provisions described in Paragraph Fifth.

Since the stations fear the loss of their broadcasting licenses, as a result of the Rules, they will not negotiate for or enter into the affiliation contract described in Paragraph Fifth with the plaintiff; nor will they negotiate for or

enter into the renewal of such affiliation contracts with plaintiff as have recently expired or are about to expire. One hundred fifteen stations licensed by the Commission have such contracts with the plaintiff expiring at various times between the original effective date of the Rules and December 31, 1947. Because these stations fear the loss of their licenses, as a result of the Rules, they have threatened to cancel and repudiate their affiliation contracts with plaintiff. Many stations have already notified the plaintiff that because of the Rules they will not be bound by their contracts with the plaintiff after the date when the Rules become effective as to existing contracts.

Tenth: As a result of the foregoing, plaintiff's ability and freedom to contract with existing and prospective affiliates is seriously restricted. Further, the obligations of existing contracts between stations and the plaintiff are necessarily destroyed on the effective date of the Rules. The Rules impair seriously the ability of the plaintiff to compete for national advertising with other national advertising media. They impair seriously plaintiff's ability to maintain its identity and the public goodwill which it has built up since its inception. They impair seriously the ability of the plaintiff to render a wide public service of informing, educating and entertaining the nation. They will make the operation of the plaintiff's business burdensome and more costly, reduce its earnings, compel plaintiff to change the fundamental character of its business, and render its property and business less valuable.

A network system of broadcasting, such as presently operated by plaintiff, and based upon affiliation contracts containing the provisions alleged in Paragraph Fifth herein is essential to the public interest, convenience and necessity, and indispensable to the fullest and most effective use of the radio facilities of the country. The Rules burden and weaken this network system of broadcasting to a serious extent. The Rules will thus inevitably result in decreasing the amount and quality of the radio program [fol. 11] service rendered the public, and thereby hinder and impede the most effective utilization of the radio facilities of the country.

Eleventh: That portion of the order promulgating the Rules referred to in Paragraph Seventh is illegal and void

for the reason that the Commission is without stautory authority to make such Rules.

Twelfth: That portion of the order promulgating the Rules referred to in Paragraph Seventh is illegal and void and beyond the power or authority of the Commission for the reasons that:

1. The Rules are unreasonable, arbitrary and destructive of plaintiff's business without legitimate reason.

2. The Rules are not required by and do not serve the public interest, convenience and necessity.

3. The Rules are not necessary to carry out the provisions or the purposes of the Communications Act of 1934.

4. The Rules are in fact contrary to the public interest, convenience and necessity, and to the provisions and purposes of the Communications Act of 1934.

Thirteenth: If the Communications Act of 1934 purports to authorize the Commission to make the Rules complained of, the said Act is, in this respect, unconstitutional and exceeds the powers of Congress because it delegates legislative power to the Commission without adequate legislative standards, contrary to Article I Section 1 of the Constitution of the United States, and because it takes the property of the plaintiff without due process of law in violation of Amendment V thereto.

Fourteenth: Unless the enforcement of that portion of the order referred to in Paragraph Seventh be permanently enjoined by the Court, plaintiff will be unable to negotiate with station licensees for the affiliation contracts described in Paragraph Fifth, or for the renewal of existing affiliation contracts. Station licensees threaten to and will cancel or repudiate subsisting contracts. Plaintiff's ability to negotiate contracts with advertisers and contracts with labor organizations of technical workers and of performing artists will be destroyed or seriously impaired. The penalty which affiliated stations will incur for entering into or per-[fol. 12] forming agreements contrary to the said regulations is so serious that no station will renew or perform any such existing agreements even for the purpose of testing the validity of the Rules. Unless relief is granted in this action, plaintiff will therefore be compelled to sub-

mit to the consequences of the Rules whether they are valid or not. Plaintiff's business identity and public goodwill will be substantially injured and its property and business rendered substantially less valuable. In the premises, plaintiff will suffer irreparable injury for which it has no adequate remedy at law.

Wherefore, plaintiff prays that the Court set aside, annul and permanently enjoin the enforcement of that portion of the order of the Commission which promulgates the Rules complained of in Paragraph Seventh and that the Court grant the plaintiff such other and further relief as may be just and equitable in the premises.

Signed: John J. Burns, Attorney for Plaintiff, Business and P. O. Address, 40 Wall Street, New York City.

Duly sworn to by William S. Paley. Jurat omitted in printing.

Exhibit "A" to Complaint

Form of Affiliation Contract

Agreement between Columbia Broadcasting System, Inc.,* 485 Madison Avenue, New York, New York and ——** licensed to operate —— —— radio station —— —— at —— full time on a frequency of —— with a power of ——.

Columbia is engaged in operating a radio broadcasting network and in furnishing programs to radio stations on the network over program transmission lines leased by Columbia or otherwise. Some of such programs, herein called "sponsored programs", are sold by Columbia for sponsorship by its client-advertisers. All non-sponsored [fol. 13] programs are herein called "sustaining programs". The Station and Columbia recognize that the audience regularly listening to the Station will be increased, to their mutual benefit, if Columbia provides the Station with programs not otherwise locally available, including broadcasts from the scenes of national and international events, presentations of music, drama and other entertain-

* Herein called Columbia.

** Herein called the Station.

ment from the principal centers of talent, informative, educational and cultural broadcasts of general interest and other programs of public acceptance and value.

Accordingly, it is mutually agreed as follows:

1. Columbia will furnish to the Station for broadcasting by the Station all available network sustaining programs, without charge, and Columbia network sponsored programs for which clients may request broadcasting by the Station and which are consistent with Columbia's sales and program policies. Columbia agrees that it will make available to the Station an average of at least sixty hours per week of network sustaining and sponsored programs. Network sustaining programs made available by Columbia are for sustaining use only and may not be sold for local sponsorship or used for any other purpose without the consent of Columbia in specific instances.

2. The Station will broadcast all network sponsored programs furnished to it by Columbia during the time when the Station is licensed to operate; provided, however, that except in connection with occasional sponsored programs of special events (such as World Series broadcasts) during periods of not more than two weeks each, the Station need not in any week broadcast network sponsored programs totaling more than fifty "converted hours" (as defined below, but for this purpose computed during the entire term of this agreement on the basis of the differences in rates at different hours specified in Columbia's Rate Card No. 23). The Station may require Columbia to give not less than twenty-eight days' prior notice of the commencement of sponsored programs for new accounts. Either the Station or Columbia may on special occasions substitute for one or more of such sponsored programs sustaining programs devoted to education, public service or events of public interest without any obligation to make any payment on account thereof, and in the event of such substitution by either [fol. 14] party it will notify the other by wire as soon as practicable after deciding to make such substitution. In case the Station has reasonable objection to any sponsored program or the product advertised thereon as not being in the public interest the Station may, on three weeks' prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the Station shall be satisfied. The Station will

not make commercial spot announcements in the "break" occurring in the course of a single network program or contiguous programs for the same sponsor and will, at the request of Columbia, desist from making commercial spot announcements in the "break" occurring before or after specified network programs.

3. Columbia will pay the Station for broadcasting network sponsored programs furnished by Columbia at the rates for "converted hours" specified in Schedule A attached hereto and hereby in all respects made a part hereof. A "converted hour" means an aggregate period of one hour during which there shall be broadcast over the Station one or more network sponsored programs for which Columbia shall charge its full night-time card rate for the Station. An aggregate period of one hour during which there shall be broadcast over the Station one or more network sponsored programs for which Columbia shall charge a fraction of its night-time card rate, such as its daytime card rate, shall be the equivalent of the same fraction of a "converted hour". Fractions of an hour shall for all purposes be treated as their fractional proportions of full hours at the same time of the day.

Payment to the Station will be made by Columbia for network sponsored programs broadcast over the Station within twenty days following the termination of Columbia's four or five week fiscal period, as the case may be, during which such sponsored programs were broadcast.

4. The Station will maintain and operate its facilities in accordance with the best practice in the broadcasting art and conduct of the industry and in accordance with good engineering practice, and will have such license or other agreements as shall be necessary to entitle the Station to broadcast copyrighted material included in programs to be furnished by Columbia.

[fol. 15] 5. If the power, frequency, time or manner of operation of the Station is changed, resulting in a substantial lessening of the value of the Station as an outlet for Columbia network programs, Columbia may at any time thereafter terminate this agreement on at least sixty days' notice to the Station.

6. Columbia will whenever practicable provide in advance notices of the programs to be furnished to the Station.

In the event of any change of programs, Columbia will notify the Station as soon as possible and the Station will make every effort immediately to conform with the substituted programs.

7. Neither party shall be liable to the other for claims by third parties or for failure to operate facilities or supply programs for broadcasting if such failure is due to failure of equipment or action or claims by network clients, labor disputes or any cause or reason beyond the party's control.

8. Columbia will continue the Station as the exclusive Columbia outlet in the present standard broadcast band in the city in which the Station is located and will so publicize the Station, and will not furnish its exclusive network programs to any other station in the present standard broadcast band in that city, except in case of public emergency. The Station will operate as the exclusive Columbia outlet in the present standard broadcast band in such city and will so publicize itself, and will not join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations. The Station shall be free to join occasional local, state-wide or regional hook-ups to broadcast special events of public importance.

9. The obligations under this agreement are subject to all applicable laws, rules and regulations, present and future, especially including rules and regulations of the Federal Communications Commission.

10. If the Station applies to the Federal Communications Commission for consent to a transfer of its license or proposes to transfer all or any of its assets without which it would be unable to perform this agreement, it will procure the agreement of the proposed transferee that, upon the consummation of the transfer, the transferee will assume [fol. 16] and perform this agreement, unless Columbia shall waive this condition in writing.

11. If either the Station or Columbia fails to insist upon strict performance of any of the covenants or conditions of this agreement, such failure shall not be construed as an election or as a waiver or condonation of any breach, or as a waiver or relinquishment for the future of any such covenants or conditions.

12. Columbia agrees that in the event it desires to offer television programs or program material or other programs or program material generally to television, short wave or ultra short wave stations, or to other stations not in the regular broadcast band, it will offer the same to any television, short wave or ultra short wave station, or other station not in the regular broadcast band, located in the city in which the Station is located, which may be owned by or affiliated with the Station before offering the same to any other such station located in the city in which the Station is located. The Station agrees that in the event it becomes the owner of or affiliated with any television, short wave or ultra short wave station, or other station not in the regular broadcast band, located in the city in which the Station is located, no arrangements shall be made involving the supplying to such station of television programs or program material or other programs or program material until Columbia shall have been advised of the terms of any such proposed arrangements and shall have been given a reasonable opportunity to enter into similar arrangements with the Station upon terms as favorable to Columbia.

13. Any notice hereunder shall be sent to the parties at their respective addresses hereinbefore set forth.

14. This agreement has been made in the State of New York and shall be governed by the laws of that State applicable to contracts fully to be performed therein, and this agreement is not subject to oral modification.

15. As of the beginning of the term hereof, this agreement takes the place of and is substituted for any and all agreements heretofore existing between the parties hereto, subject only to the fulfillment of any accrued obligations thereunder.

[fol. 17] The term of this agreement shall begin on —— —, ——, provided, however, that this agreement may be terminated at any time prior thereto by Columbia by sending written notice to the Station at least twelve months prior to the effective date of termination specified therein.

In Witness Whereof, this agreement has been signed by the parties and dated the — day of ——, 19—.

Columbia Broadcasting System, Inc., by —— ——, ——, by —— ——.

Exhibit "B" to Complaint

Before the Federal Communications Commission

Washington, D. C.

Commission Order in Docket No. 5060

In the Matter of the Investigation of Chain Broadcasting

May 2, 1941

Whereas, the Commission on March 18, 1938, by Order No. 37, authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity;"

Whereas, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and "to make reports to the Commission with recommendations for action by the Commission;"

Whereas, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;

Whereas, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and

Whereas, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached;

[fol. 18] Now, Therefore, It Is Hereby Ordered, That the following regulations be and they are hereby adopted:

3.101. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization [1] under which the station is prevented or hindered from, or penalized for broadcasting the programs of any other network organization. See Chapter VII, A, 1.

3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or under-

[1] The term "network organization," as used herein, includes national and regional network organizations. See Chapter VII, J.

standing, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. See Chapter VII, A, 2; and J.

3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer than one year: *Provided,* That a contract, arrangement, or understanding for a one-year period, may be entered into within sixty days prior to the commencement of such one-year period. See Chapter VII, B.

3.104. No license shall be granted to a standard broadcast station, having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time. See Chapter VII, C.

3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or under- [fol. 19] standing, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance. See Chapter VII, D.

3.106. No license shall be granted to a network organization, or to any person directly or indirectly controlled by

or under common control[2] with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. See Chapter VII, E.

3.107. No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided,* That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network. See Chapter VII, F.

3.108. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs. See Chapter VII, G.

[fol. 20] It Is Further Ordered, That these regulations shall become effective immediately: *Provided,* That, with respect to existing contracts, arrangements, or understandings or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further,* That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties.

Federal Communications Commission, T. J. Slowie, Secretary.

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[2] The word "control," as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

Exhibit "C" to Complaint

Opinion on Rehearing

October 11, 1941.

On May 2, 1941, the Commission promulgated its Report on Chain Broadcasting acompanied by eight regulations setting forth a statement of the policy to be followed by the Commission in licensing stations owned by or affiliated with network organizations. The concluding paragraph of the order promulgating the regulations dealt with their effective date, which, with respect to existing affiliation contracts and station licenses, was set at 90 days from the date of the order.[1] On June 13, 1941 the Commission amended the concluding paragraph of the order to clarify its intent that the 90-day deferment period mentioned in that paragraph should apply to the disposal of one NBC network as well as to the disposition of individual stations by networks, and further that the effective date of compliance in either case might be extended from time to time in order to permit the orderly disposition of properties.

Extensive hearings before the Senate Committee on Interstate Commerce were held during June, 1941 on the White Resolution [2] which called for a study of the Commis- [fol. 21] sion's Chain Broadcasting Regulations. During July and August, following these hearings, representatives of NBC, CBS, and Mutual held a series of conferences with the Chairman of the Commission, its General Counsel and members of his staff, and in the later stages, with Commissioner Walker. Representatives of some of the regional

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[1] *Report on Chain Broadcasting,* Commission Order No. 37, Docket No. 5060, May, 1941.

[2] Senate Resolution No. 113, 77th Congress, 1st Session. The Resolution, introduced by Senator White, provided for an investigation of the probable effects of the regulations upon the broadcasting industry and of the authority of the Commission to promulgate and enforce them, and also requested the Commission to postpone the regulations until 60 days after the Senate Interstate Commerce Committee reported to the Senate. The hearings before the Committee were adjourned on June 20, 1941, subject to the call of the Chairman.

networks and some of the affiliates also conferred with members of the Commission and its staff during this period.[3] These conferences were devoted to a discussion of the Chain Broadcasting Regulations, with particular emphasis upon the provisions dealing with network option time. On July 22, 1941, during the course of these conferences, the Commission, on petition of NBC and CBS, postponed the effective date of its Order of May 2, 1941, as to existing affiliation contracts, network organization station licenses, or the maintenance of more than one network by a single network organization, from July 30 until September 16, 1941.

At the termination of these conferences, the Mutual Broadcasting System on August 14, 1941, filed with the Commission a petition requesting it to amend its regulations dealing with network option time and the duration of affiliation contracts. The Mutual petition requested that the Commission permit affiliation contracts up to two years in duration and allow stations to option exclusively to one network the particular periods of time utilized by the network for network commercial programs during the preceding year and to option additional time to one or more networks on a non-exclusive basis; in either case the station to reserve several hours per day free from any network option. On August 28, 1941, Mutual's petition was set for argument before the Commission *en banc* on September 12, 1941 and the Commission announced that at that time it [fol. 22] would also hear any other network organizations or licensees who desired to be heard with respect to the Chain Broadcasting Regulations as promulgated, the Mutual petition, or any other modification of any of the Chain Broadcasting Regulations which those appearing desired to propose. The Commission further announced that the Chain Broadcasting Regulations would not be placed in effect with respect to existing affiliation contracts, or network organization station licensees, or the maintenance of more than one network by a single network organization, until after the disposition of the Mutual petition and of any other which might be filed. Oral arguments on the Mutual petition were heard before the Commission *en banc*

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[3] *Cf.* Report of the Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong. 1st Sess., (1941) pp. 35-42.

on September 12, 1941. Oral arguments were presented on behalf of the Mutual Broadcasting System, the National Broadcasting Company, the Columbia Broadcasting System, and the Colonial and Yankee Networks, and briefs were filed on behalf of the three nation-wide network organizations.

After a careful study of the testimony presented before the Senate Committee on Interstate Commerce, of the considerations presented at the conferences which followed the hearings, and of the oral arguments presented at the hearing on Mutual's petition and of the briefs filed at that time, and after a thorough reconsideration of the entire subject, the Commission has decided to amend three of the Chain Broadcasting Regulations to read as follows:

Regulation 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Regulation 3.103. No license shall be granted to a standard broadcast station having any contract arrangement, or [fol. 23] understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

Regulation 3.104. No license shall be granted to a standard broadcast station which options[1] for network programs

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[1] As used in this regulation, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents

any time subject to call on less than 56 days' notice, or more time than a total of three hours [2] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.[3] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

Territorial Exclusivity

At the hearings on the White Resolution it was argued on behalf of NBC and Columbia that Regulation 3.102 would [fol. 24] permit the largest and most powerful stations in each city to take most of the desirable network business away from the smaller and less powerful stations, and that the elimination of territorial exclusivity would prevent a regular affiliation between a network organization and a station.

In order to clarify the meaning of Regulation 3.102 the Commission has determined to add the following sentence to that regulation:

"This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station

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or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

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[2] All time options permitted under this regulation must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified option hours correspondingly as agreed by the station and network organization.

[3] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization."

This sentence does not change the meaning[1] of Regulation 3.102 but is intended to eliminate confusion with respect to its interpretation. Regulation 3.102 is not intended to and does not prohibit a regular affiliation contract whereby a network agrees to make a first offer of all its programs to one particular station in a given community. The Commission believes, however, that in the case of non-commercial public service programs of outstanding national or international significance, such first offer should not constitute an exclusive offer and that the network should be left free to furnish such programs to other stations in the same area.

Duration of Affiliation Contracts

Under present rules the license of a standard broadcast station is limited to one year. The broadcast industry has reached a point of maturity where it appears advisable to increase the license period of standard broadcast stations to two years. The Commission believes that this action will bring an increased measure of stability to the broadcast industry without any detrimental results. By separate action [fol. 25] taken this day we are amending Sections 3.34 and 4.3 of our rules to accomplish this result.

In connection with the extension of the license period for all standard broadcast stations from one year to two years, the Commission has determined to license stations which have entered into affiliation contracts whose term is not longer than two years. In its report, the Commission found that the five-year affiliation contracts entered into by NBC and CBS were intended to prevent any real competition in the network-station market, and that such long term contracts were a substantial factor in suppressing such competition. The Commission found that as a result the

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[1] In its public notice No. 51314 dated June 19, 1941, the Commission informally approved the new Mutual network form of contract which contained a provision giving the station the first call on Mutual network commercial and sustaining programs in the city in which the station is located.

public lost the benefits of competition between stations for affiliation with the existing networks, and was also deprived of the advantages that might flow from the establishment and development of new networks. In its report of May 2, 1941, the Commission found that no business need was shown for an affiliation contract longer than one year. The Commission also found that competition would be fostered if opportunity were provided for annual readjustments on the basis of comparative showings of networks and stations.

After a consideration of the arguments presented on Mutual's petition and a reconsideration of the entire subject of the duration of affiliation contracts, the Commission concludes that a two-year affiliation contract will permit a reasonable measure of stability in network-station relationships without at the same time seriously interfering with competition in the net-work-station market. Of course, what precise limit on the duration of affiliation contracts is most desirable is a matter of judgment. A two-year affiliation contract represents a substantial diminution from the five-year term currently being utilized by NBC and CBS, and may be expected to remove that restraint upon competition and give freer play to competitive factors by making possible readjustments between stations and networks on a biennial basis.

Network Option Time

The option-time regulation promulgated by the Commission on May 2, 1941 (Regulation 3.104), prohibited all optioning of time by stations for network programs. That regulation was based upon the finding of the Commission that the optioning of time by licensee stations restricted [fol. 26] their freedom, interfered with their ability to serve local program needs, hampered their efforts to broadcast local programs, national spot, and other non-network programs, and restricted competition in network programs.

Notwithstanding these serious restraints imposed upon station licensees by network options, NBC and CBS utilize only a fraction of the valuable broadcast hours which they place under option. The NBC option for most of its affiliates covers 8 or 8½ specified hours per day, while the CBS option covers the entire broadcast day. Upon 28 days' notice, NBC and CBS may call upon their outlets to carry network commercial programs during the optioned time and

to move whatever other programs they may have scheduled during those periods. In 1938 NBC used for network commercial programs only 58.1 per cent of the optioned time of stations on the basic Red network and only 19.4 per cent on the basic Blue network and CBS used only 39 per cent of the optioned time of its basic stations. The Commission found that this great disparity between option and use was an abuse which seriously interfered with the non-network program service of station licensees and restricted the broadcasting of programs of other networks.

The Commission is not convinced by the contention of NBC and CBS that the optioning of time by networks is indispensable to network operations, particularly since the chain broadcasting regulations, neither in their original form nor as herein amended, place any restrictions on the bona fide purchase of station time by networks. Networks have heretofore successfully operated without option time. However, it is clear that some optioning of time by networks in order to clear the same period of time over a number of stations for network programs will operate as a business convenience. Within certain limits, it should be possible for stations to option time for network programs without interfering too seriously with their local program requirements, with their local and national spot business, and without restricting the access of competing networks to those stations. The Commission believes that the option-time regulation as herein amended accomplishes that result.

Under the amended regulation the broadcast day is divided into four segments: 8 a.m. to 1 p.m.; 1 p.m. to 6 p.m.; 6 p.m. to 11 p.m.; and 11 p.m. to 8 a.m. A station is permitted to option up to three hours during each segment [fol. 27] to one or more network organizations on a non-exclusive basis. The regulation provides that the hours covered by option must be specified hours for, if a roving option were permitted, the station would be effectively prevented from scheduling any non-network programs during any of the hours on which such roving option might conceivably settle. Stations are prevented by the regulation from optioning any time to networks subject to call on less than 56 days' notice. The call period currently being utilized is 28 days. This lengthening of the call period will give stations greater freedom in scheduling local and non-network national programs during the hours of the broadcast day which are subject to network option; for

such programs, even though subject to be moved, may be assured of at least eight weeks of continuous broadcasting. Nor does it seem that the increase in the call period will seriously affect national network business; for the national networks have pointed out that theirs is a long-range business and that large-scale national advertising network programs are usually planned and arranged for many months and even a year or two ahead of the actual commencement of the broadcasts. Under such circumstances, it does not appear that a 56-day call period will impose any serious hardship upon national network operations.

One of the results of the amended option-time regulation will be that during at least two specified hours within each of the important three segments of the broadcast day—morning, afternoon, and evening, a sation may not option time for network programs, so that non-network programs may be scheduled during these hours without fear of removal as a result of network options. During the night segment, from 11 p.m. to 8 a.m., a station may option up to three hours for network programs. For the most part, programs broadcast within those hours have been local programs; but some networks, Colonial, for example, have originated programs during the early morning or late evening hours which have been broadcast by their outlets with apparent wide listener acceptance.

The amended option-time regulation does not require any station to option any time to any network; it simply sets the maximum amount of time which a station may place under option for network programs. Stations and networks are free to negotiate which specific hours are to be placed under option and how many hours, within the limits speci-[fol. 28] fied in the regulation, are to be placed under option. A network, by virtue of whatever option it is successful in negotiating, to that extent secures the right-of-way over local and national non-network programs during the time under option. But during at least two specified hours within each of the three more important segments of the broadcast day and during at least six hours of the night segment a station may not option time for network programs. Local and non-network national programs being broadcast within such periods may not be subjected to be moved as a matter of contract in order to accommodate network programs, and the networks may utilize such hours only by the outright purchase of time.

It has been the consistent intention of the Commission to assure that an adequate amount of time during the good listening hours shall be made available to meet the needs of the community in terms of public expression and of local interest. If these regulations do not accomplish this objective, the subject will be given further consideration.

By providing that the options for network programs must be on a non-exclusive basis, the amended option-time regulation prevents the option-time device from being utilized to restrain competition offered by other networks. While a station is not compelled to option the same hours to more than one network, it may not enter into any arrangement with one network organization which prevents it from optioning or selling the same or other time to other network organizations. This is an all-important consideration in the many cities which contain only three full-time stations to which all four national networks seek access. Where a station options the same period of time to several networks, the mere existence of the option will not preclude network competition; for that period of time will be available for sale by all the networks holding the option. The first network which is successful in selling any particular period under option will, of course, reap the benefit of the option as long as the time remains sold. Although they have used only a fraction of the optioned time of their outlets, CBS and NBC have been able to prevent a competing network from using the unused time of their affiliates simply because those periods are under option to them. Under the amended option-time regulation, NBC and CBS will be able to exclude other networks only in the event and to the extent that they actually utilize the time under option. [fol. 29] The non-exclusive option should be instrumental in fostering competition between networks and at the same time should make it possible for a network organization to clear time over a number of stations for a network program. Without any optioning of time, the greatest obstacle in the way of clearing the same period of time over a number of stations for a network program would be the fact that many of the stations might have scheduled local and non-network national programs during various periods of the broadcast day. During whatever period of time is included within the non-exclusive option, local and non-network national programs will be subject to be moved on 56 days' notice. A station must remain free, however, to

sell or option time, included within the non-exclusive option period but not actually being utilized for a network commercial program, to one or more other network organizations.

After weighing the considerations in support of the non-exclusive option against those advanced in opposition, the Commission has come to the conclusion that the non-exclusive option appears to be a particularly appropriate solution of the problem of clearing time for network programs and at the same time of fostering competition in the network-station market.

The Commission has rejected the proposal, suggested but not unqualifiedly recommended in the Mutual petition, to permit a station to option exclusively to one network the particular periods of time utilized by that network for network commercial programs over the station during the preceding year. An exclusive option effectively removes a station from the station-network market with respect to all the time it covers. The Commission believes that such a serious restraint upon competition is inconsistent with the freely competitive system contemplated by Congress in the Communcations Act of 1934. An exclusive option, to the extent that it encompasses the most valuable broadcast hours, approaches the effectiveness of the exclusivity clauses in affiliation contracts in denying other networks access to a station, and is therefore objectionable for many of the reasons given in the Report for the elimination of exclusive affiliation. Nor is the fact that a given network has utilized a particular period of time over a station any real justification for placing that time under exclusive option. The network which has a contract for a commercial [fol. 30] program with a sponsor and which has been sending that program to a number of its affiliated stations throughout a season already has an almost insuperable advantage in selling that program for another year; for commercial program series are frequently renewed year after year. To permit such a network to have an exclusive option over its affiliated stations on the periods used for commercial network programs would effectively destroy the possibility of competition for those periods.

Multiple Network Operation by NBC

The Commission has determined to suspend indefinitely Regulation 3.107, which provides that no license shall be

granted to a standard broadcast station affiliated with a network organization which maintains more than one network. Separate ownership of what are now the Red and Blue networks of NBC is so generally recognized to be desirable that we believe a separation will soon occur without the spur of a legal mandate. Any policy requiring the sale of substantial properties should be applied with due regard for the preservation of fair values, and the Commission wishes to avoid the semblance of pressure on NBC to effect a forced sale.

In addition to suspending this regulation, the Commission has provided that any subsequent order placing the regulation in effect shall provide for a period of at least six months between the announcement and the effective date, and for further extension of the effective date from time to time if necessary to prevent a forced sale. As amended, the paragraph setting forth the effective date of the Chain Broadcasting regulations reads as follows:

"IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely, and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice [fol. 31] and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

Other considerations have motivated the Commission in this decision. The Commission is desirous of seeing that the network which is disposed of by NBC is transferred to a responsible new owner as a going organization with its personnel, talent, programs and stations intact as far as possible. NBC's existing affiliation contracts and those that it may negotiate in the future will be an important factor in the continued profitable and efficient operation of its networks. Therefore, pending the development of plans

for the disposition of one of the NBC networks as a unit, the Commission has deemed it wise to suspend this regulation.

Conclusion

The Commission adheres to the views expressed in its report on Chain Broadcasting. It is of the opinion that the chain br-adcasting regulations will tend to decentralize the tremendous power over what the public may hear which is now lodged in the major network organizations, and will remove existing restraints upon competition without interfering unduly with the operations of the network organizations. The Commission has further concluded, however, that the regulations may be amended as set out above without sacrifice of these objectives, and that the amendments will additionally insure that no aspect of the network broadcasting structure will be unnecessarily or unduly disturbed.

For the reasons stated at pages 77 to 79 of its Report, the Commission has determined that its chain broadcasting regulations should be applicable to regional as well as national networks. Special circumstances and considerations may be applicable in the case of regional networks, and the Commission will examine any further representations on their behalf with especial care.

The Commis-ion stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances [fol. 32] the chain broadcasting regulations should not be applicable to any particular situation.

Federal Communications Commission, Washington, D. C.

October 11, 1941.

Order

At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the 11th day of October, 1941.

The Commission having under consideration the petition of the Mutual Broadcasting System, filed August 14, 1941, requesting that the Commission amend its order entered in Docket No. 5060 promulgating regulations appli-

cable to radio stations engaged in chain broadcasting by modifying the regulations dealing with option time and the duration of affiliation contracts, having heard oral argument on said petition and having reconsidered its report and order in Docket No. 5060,

It Is Ordered, That the Commission's order of May 2, 1941, entered in Docket No. 5060, Be, and the Same is Hereby, Amended in the following particulars:

Sections 3.102, 3.103, and 3.104 of the Regulations set forth in said order are hereby amended to read as follows:

Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a network organiza-
[fol. 33] tion which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

Section 3.104. No license shall be granted to a standard broadcast station which options [1] for network programs any

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[1] As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

time subject to call on less than 56 days' notice, or more time than a total of three hours [2] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.[3] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

The last paragraph of said order is hereby amended to read as follows:

"It Is Further Ordered, That these regulations shall become effective immediately: *Provided,* That, with respect [fol. 34] to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further,* That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further,* That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

T. J. Slowie, Secretary.

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[2] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

[3] These segments are to be determined from each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

DISSENTING OPINION OF COMMISSIONERS NORMAN S. CASE AND T. A. M. CRAVEN, OCTOBER 11, 1941

We disagree with the supplemental report of the Commission on Chain Broadcasting, in Docket 5060, for the same basic reasons previously outlined in our dissenting opinion, filed with the Commission's original report on this matter, dated May, 1941. We remain convinced that the majority of the Commission exceeds the power delegated to the Commission in the Communications Act of 1934. We also are convinced that the aggregate effect of the proposed rules will not result in a broadcasting system more in the public interest than that of today. We fear that the nation's radio service may be seriously impaired at a time when efficient service is most needed. Furthermore, we believe that the effect of the rules is certain to result in deterioration of the present excellent public service programs now rendered to the nation by the radio industry.

The effect of the regulations will be to change radically the business structure of the broadcast industry. The present is no time to force revolutionary reforms upon an industry which has served the public interest of the nation, particularly when such reforms bear no relation whatsoever to the national defense effort. The radio industry has cooperated wholeheartedly with the Government in this national emergency in spite of the fundamental and imminent changes in the national economic structure. These economic changes may cause vast readjustments in all industry as well as by the entire public. The cumulative effect of these [fol. 35] basic national economic readjustments upon the radio industry cannot be determined with accuracy at this time. Therefore, it appears to us that to add to the instability of the radio industry by enforcing new Government regulations, which in themselves superimpose fundamental economic readjustments, is unwise. There is no evidence in this record which justifies such a sweeping change as is compelled by these new rules promulgated by the majority of this Commission. Any improvements which may seem desirable in the operation of the existing broadcast structure can be obtained in an evolutionary manner by far less harsh measures than those proposed by the majority in the instant case.

We do not condone unreasonable restraints upon competition within the broadcasting industry of this country, and

therefore, advocate that if any abuses of this nature exist, they should be corrected forthwith either by voluntary action within the industry or else by procedures undertaken by agencies of the Government having legal jurisdiction in the premises. Likewise, we subscribe to the doctrine of reasonable diversification in the control of the radio broadcasting channels. It is for this latter reason that we believe the ultimate separation of one of the two networks now operated by the National Broadcasting Company will be an improvment of benefit to the public.

In this respect, however, we believe that the Government should not force private enterprise to dispose of its property on an unsound business basis when such enterprise has rendered good service to the public, and particularly when, as in this case, the Government itself has previously given its tacit approval and encouragement to the enterprise. Consequently, we welcome the fact that the majority has suspended the effective date of its original regulation (Sec. 3.107) to force the sale of one of the networks now operated by the National Broadcasting Company.

Our present objection is centered on the modified regulation, 3.104. Ostensibly this regulation permits options to be taken by a network on an affiliated station's time. In reality, however, an affiliate must be free to option identical time to all networks regardless of affiliation. Under such conditions it should be obvious that absurd complexities may easily arise in the ordinary conduct of business. It is true that another regulation permits a station to contract with a network for first call on a network's program offerings. [fol. 36] If it be reasonable for an affiliate to contract for first call on a network's programs, it is obviously reasonable for the network to obtain first call on the affiliate station's time. However, the latter is specifically prohibited by the regulation. Apparently by changing the regulation originally promulgated, the majority intended to recognize the practical business situation in broadcasting. It is our opinion that the new regulation does not accomplish this purpose and that networks in reality secure no substantial option privileges under this regulation. We believe that stations should be permitted to utilize the same option principles as is done in ordinary business.

The time has come to create stability in the radio industry rather than instability. We believe that service to the public would be enhanced by extending the broadcast sta-

tion license period to the legal limit of three years. Network companies should be permitted to contract for regular affiliates with which they can engage in business in accord with sound business principles. In this connection we believe that an improvement in the existing situation can be obtained if network affiliates are free at all times to exercise final judgment as to whether or not any program offered to them by the network will service public interest in the community served by the station. We also believe that the affiliates should have equal power with the networks to terminate the affiliates' contract on due notice.

(Signed) Norman S. Case. (Signed) T. A. M. Craven.

October 11, 1941.

EXHIBIT "D" TO COMPLAINT

Order Instituting Chain Broadcasting Investigation

Federal Communications Commission,
Washington, D. C.

March 18, 1938.

Order No. 37

Whereas under the provisions of section 303 of the Communications Act of 1934, as amended, "the Commission, from time to time, as public convenience, interest, or neces- [fol. 37] sity requires, shall—(1) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and

Whereas the Commission has not at this time sufficient information in fact upon which to base regulations regarding contractual relationships between chain companies and network stations, multiple ownership of radio broadcast stations of various classes, competitive practices of all classes of stations, networks, and chain companies, and other methods by which competition may be restrained or by which restricted use of facilities may result; Now therefore,

It is ordered, That the Federal Communications Commission undertake an immediate investigation to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity; such investiga-

tion to include an inquiry into the following specific matters, as well as all other pertinent and related matters, including those covered in the report on social and economic data prepared by the Engineering Department of the Federal Communications Commission and filed with the Commission on January 20, 1938:

1. The contractual rights and obligations of stations engaged in chain broadcasting, arising out of their network agreements.

2. The extent of the control of programs, advertising contracts, and other matters exercised in practice by stations engaged in chain broadcasting.

3. The nature and extent of network program duplication by stations serving the same area.

4. Contract provisions in network agreements providing for exclusive affiliation with a single network and also provisions restricting networks from affiliation with other stations in a given area.

5. The extent to which single chains or networks have exclusive coverage in any service area.

6. Program policies adopted by the various national and other networks and chains, with respect to character of programs, diversification, and accommodation of program characteristics to the requirements of the area to be served.

[fol. 38] 7. The number and location of stations licensed to or affiliated with each of the various national and other networks. The number of hours and the specified time which such networks control over the station affiliates and the number of hours and the specified time actually used by such networks.

8. The rights and obligations of stations engaged in chain broadcasting so far as advertisers having network contracts are concerned.

9. Nature of service rendered by each station licensed to a chain or network organization, particularly with respect to amount of program origination for network purposes by such stations.

10. Competitive practices of stations engaged in chain broadcasting as compared with such practices in the broadcasting industry generally.

11. Effect of chain broadcasting upon stations not affiliated with or licensed to any chain or network organization.

12. Practices or agreements in restraint of trade or furtherance of monopoly in connection with chain broadcasting.

13. Extent and effects of concentration of control of stations locally, regionally, or nationally in the same or affiliated interests, by means of chain or network contracts or agreements, management contracts or agreements, common ownership or other means or devices, particularly insofar as the same tends toward or results in restraint of trade or monopoly.

It It Further Ordered, That hearings be held in connection with such investigation at such times and places as the Commission shall designate.

It Is Further Ordered, That a copy of this order be posted in the office of the Secretary and that a copy of the same be mailed to each licensee of a broadcast station and to each chain and network organization.

By the Commission.

T. J. Slowie, Secretary.

[fol. 39] EXHIBIT "E" TO COMPLAINT

Federal Communications Commission,

Washington, D. C.

September 20, 1938.

To Licensees of All Standard Broadcast Stations:

In Re: Commission Order No. 37, Docket No. 5060

GENTLEMEN:

Enclosed herewith find hearing notice issued with reference to Order No. 37 on which a hearing is scheduled to be held October 24, 1938 at the offices of the Commission in Washington, D. C., and a copy of said Order.

Also enclosed is an itemized list of the matters concerning which each network has been requested to furnish complete and detailed information at the hearing.

The Commission in its investigation under Order No. 37 plans to make a comprehensive study of all contracts, agreements and other arrangements between licensees of broadcast stations and other persons or organizations which involve the management, control, or operation of such stations. You are therefore directed to file within ten days from the date hereof, in triplicate, with the Commission copies of all such contracts or agreements affecting your station and a memorandum stating the substance of any such contract, agreement, or arrangement which has not been reduced to writing, together with a verified statement setting forth in detail the manner and extent to which the same affect in practice the management, control or operation of your station. This statement should include the names and addresses of the persons or organizations who are parties to the same. Any of this information which may have already been filed with the Commission may be incorporated by an appropriate specific reference. You will be advised as soon as possible after the receipt of this information whether or not the Commission will require that you present through a qualified witness or witnesses at the hearing any further information with respect to this matter.

If you have access to or possess any evidence bearing on any phase of the investigation which you believe should be [fol. 40] presented for the consideration of the Commission, a notice of appearance should be filed in conformity with the notice of hearing, which is enclosed herewith.

You are also directed to file at the same time a detailed statement, properly verified, covering the kind and amount of electrical transcriptions or other recordings your station has used and now uses for program purposes, and your past and present relations with, and extent to which through stock ownership, contract or otherwise you control or are controlled by companies engaged in producing or distributing such recordings.

The order in which appearances will be called at the hearing will be published by the Commission as far in advance of the date of hearing as possible.

Very truly yours, (Signed) T. J. Slowie, Secretary.

Enclosures.

(First Enclosure)

29491

Federal Communications Commission

Washington, D. C.

Notice of Hearing

In the Matter of Commission's Order No. 37

Docket No. 5060

Pursuant to Commission's Order No. 37 notice is hereby given that commencing at 10:00 A. M., October 24, 1938, at the offices of the Commission, Washington, D. C., the Commission will hear any person or organization desiring to present evidence on the matters included for investigation in Commission order No. 37.

Any person or organization desiring to be heard shall, within fifteen days from the date of this notice, file with the Commission a verified notice of its intention to be present and participate in said hearing and shall set forth in detail a complete statement of the evidence to be offered by such person or organization. An original and eight copies of such notice of appearance shall be filed.

Dated at Washington, D. C., September 20, 1938.

Federal Communications Commission, T. J. Slowie (Signed), Secretary.

[fol. 41] (Second Enclosure)

29484

Matters as to Which Each Network Shall Present Evidence at the Hearing Held Pursuant to Order #37

1. Corporate and financial history of network organization including detailed information on both direct and indirect ownership or control thereof;

2. Nature and character of activities engaged in by network from the date of its organization;

3. Name, number and location of all stations now or previously licensed to or affiliated in any manner with network with particular reference to the reasons for entering into

or terminating any such affiliation and the basis upon which additional affiliations are entered into;

4. Nature of contracts, agre-ments or other arrangements between network and affiliates including reasons for various provisions of such contracts, agreements, or other arrangements, and history of the same;

5. Classification and grouping of stations connected with network as basic supplemental, etc., with reasons for same;

6. Financial arrangements between stations and affiliates, including basis for charges made by networks and affiliates;

7. The history and development of the network program policy, particularly with reference to standards which programs must meet, diversification, accommodation of program characteristics to the requirements of the area served, and program and advertising continuity;

8. Extent to which affiliates are required to conform to network program policy and extent to which affiliates control or influence policy;

9. History and development of operating policy and procedure with particular reference to contracts and agreements with wire companies for program transmission;

10. History and development of policy with respect to sale of time for advertising or other purposes, particularly with respect to standards applicable to products or services for which advertising is accepted;

11. Detailed information as to the hours which network controls over affiliated stations, the number of such hours actually used for network, commercial purposes over affiliated stations and the number of hours of network sustaining programs actually used by affiliates;

[fol. 42] 12. Rights of network and affiliates in event affiliate desires to substitute a local program for a network program.

13. History and development of agreements, contracts, or other arrangements between networks and advertisers, or other program sponsors, particularly and in detail agreements, contracts, or other arrangements with persons or organizations acting as agencies for the placing of broadcast advertising or the sale of time over the network;

14. History and development of policies with reference to the development of program talent and facilities of network organization devoted to that purpose;

15. Explanation and details of the organization, function, policies and practices of any agency directly or indirectly controlled by the network organization which retains and procures talent for the purpose of selling such talent to the sponsors of commercial radio programs;

16. The nature of the service rendered by each station licensed to the network, particularly with respect to the amount of program origination for network purposes at such stations and with respect to the nature of the local service rendered by such stations;

17. Name of any national advertising agency, user, or national representative of a station whose officers, directors, stockholders or proprietors hold any securities of the network organization, and the exact extent of such holdings;

18. Name of any national advertising agency, user, or national representative of a station, the securities of which are held by the network, its officers, directors, or proprietors;

19. Any relationship that may exist between the network and any national advertising agency, user, or national representative of a station through officers, directors, proprietors, employees, or security holders in common, and the exact nature and extent of such relationship;

20. Extent of program duplication in the primary and secondary service areas of stations carrying the network programs, particularly the percentage of population in the primary service area of each network station which may receive a network program as primary service from such station and from other network stations, the percentage of secondary service area of each network station which receives a network program as secondary service from such station and from other network stations, the number and extent [fol. 43] of such duplications and amount of duplication required for adequate service on chain programs. The primary and secondary service areas shall be considered as defined in the Commission's proposed Rules and Regulations governing standard broadcast stations and Standards of Good Engineering Practices concerning the same.

Exhibit "F" to Complaint

Procedure for Oral Argument on Network Inquiry Report

Federal Communications Commission,
Washington, D. C., November 28, 1940.

The Federal Communications Commission today announced procedure for the oral argument on the committee network inquiry report made public June 12, 1940.

The hearing is scheduled for Monday and Tuesday, December 2 and 3, in hearing room A, Interstate Commerce Commission Building, starting at 10:30 a. m.

Each party will be allowed a maximum of 1 hour of argument on the issues of fact and policy raised in the committee report. The order of argument will be as follows: National Broadcasting Co.; Columbia Broadcasting System; Independent Radio Network Affiliates, Inc.; Don Lee Broadcasting System; Mutual Broadcasting System; Roy L. Albertson (WBNY); Rock Island Broadcasting Co. (WHBF); Voice of Longview (KFRO); World Broadcasting System, Inc.; Association of Radio Transcription Producers of Hollywood, Inc.; American Federation of Musicians; Independent Artists' Representatives; Associated Music Publishers, Inc.

In order to facilitate the oral argument, counsel are requested to consider the advisability and effect of the promulgation by the Commission of the following special regulations with respect to chain broadcasting. In several instances these suggestions are in the alternative, and the Commission desires to hear argument on the advisability and effect of alternative suggestions. It is to be understood that the regulations have not received the approval of the Commission, and are to be taken as suggestions by the Commission intended to focus the attention of counsel upon the issues raised in the report. It should also be understood [fol. 44] that counsel are not in any way limited to a discussion of these regulations but may address themselves to any of the issues of fact or policy raised by the report of the chain broadcasting committee.

1-A. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which provides for or has the

effect of establishing an exclusive affiliation with the network organization.

or

1-B. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which provides for or has the effect of establishing an exclusive affiliation with the network organization; *Provided,* That such restriction shall not apply to licensees of stations located in or rendering primary service to cities receiving adequate primary service from five or more full-time stations.

2. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with any network organization which gives the network organization an option on the hours of operation of the licensee's station for the broadcasting of commercial programs (a) for more than 30 percent of the converted hours of operation in any city receiving adequate primary service from three full-time stations with comparable facilities; (b) for more than 20 percent of the converted hours of operation in any city receiving adequate primary service from two full-time stations with comparable facilities; (c) for more than 10 percent of the converted hours of operation in any city receiving adequate primary service from one full-time station; (d) for a total number of converted hours exceeding by more than 25 percent the converted hours during which such licensee has broadcast commercial programs transmitted to the licensee by the network organization during the 6 months preceding the effective date of the contract.

3-A. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with any network organization, the terms of which exceed in duration the effective period of the license granted by this Commission. For the purposes of this section, an agree-[fol. 45] ment shall be considered as exceeding in duration the effective period of the license if the agreement gives either party an option to extend the contract beyond the termination of the license; *Provided,* That this restriction shall not be construed as preventing a licensee from entering into a contract with a network organization a reasonable period of time, not to exceed 30 days, in advance of the expiration date of the existing contract.

or

3-B. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which gives the network organization any rights with respect to the renewal or cancellation of such contractual arrangement not given to the licensee.

or

3-C. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization for a period longer than 2 years.

4. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which controls, restrains, limits, or in any other way interferes with the establishment of the rates to be charged by the licensee for the sale of available broadcast time to advertisers or other clients.

5. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which has the effect of or will result in the broadcasting of the programs of one network company by two or more standard broadcast stations rendering adequate primary service to the same city.

6-A. After January 1, 1942, no licensee of a standard broadcast station shall, directly or indirectly, own or be owned by, or be under common control with or have any interests in a chain or network organization; *Provided*, That the Commission will grant reasonable extensions of time in the event that the licensee is unable to meet the requirements of this restriction before its effective date.

[fol. 46] or

6-B. No person engaged in network broadcasting shall be licensed to operate more than two clear channel stations or more than three standard broadcast stations of all classes.

or

6-C. No person engaged in network broadcasting shall be licensed to operate any standard broadcast station located

in a city receiving adequate primary service from less than five full time standard broadcast stations.

7. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, which prevents the licensee from rejecting, for reasonable cause, any program offered by the network organization. The contracts between the station licensees and network organizations shall expressly guarantee the right of program rejection by the licensee, and the judgment of such licensee shall be prima facie evidence of the reasonableness of rejection claims.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER AMENDING COMPLAINT—Filed January 28, 1942

Plaintiff having moved for an order that the complaint herein be deemed to be amended, for all purposes including plaintiff's motion for a temporary injunction and defendants' motion to dismiss the complaint or for summary judgment, in the respects set forth in the Notice of Motion dated January 5, 1942; said motion having regularly come on to be heard before this Court on January 12, 1942, at the hearing of plaintiff's motion for a temporary injunction and of defendants' motion to dismiss the complaint or for summary judgment;

Now, on reading and filing the Notice of Motion dated January 5, 1942, with proof of service thereof in support of the motion and the Court having heard John J. Burns, attorney for plaintiff, by Charles E. Hughes, Jr., of coun- [fol. 47] sel, in support of the motion, and there being no opposition to the granting thereof if granted upon condition that defendants' motion to dismiss the complaint or for summary judgment be deemed made against the complaint as amended, and due deliberation having been had, it is

Ordered, that plaintiff's said motion be and the same hereby is granted; and that the complaint in this action be amended in the following respects:

(a) By inserting on page 5 thereof, immediately after the first sentence of paragraph Fourth, the following:

"The stations included in plaintiff's network comprise 115 standard broadcast stations which are independently owned, 7 standard broadcast stations owned and operated by plaintiff and designated and known as Stations WABC, New York, WJSV, Washington, D. C., WBBM, Chicago, KMOX, St. Louis, WCCO, Minneapolis, KNX, Los Angeles, and WBT, Charlotte, N. C.; and one standard broadcast station designated and known as WEEI, Boston, which plaintiff leases and operates."

(b) By inserting on page 7 thereof, immediately after the first sentence of paragraph Seventh, the following:

"The report was designated 'Report on Chain Broadcasting—Federal Communications Commission—Commission Order No. 37, Docket No. 5060, May 1941.'"

(c) By inserting on page 7 thereof, in the tenth line of paragraph Seventh, immediately after the words "a copy of the" the words "report and".

(d) By inserting on page 9 thereof, in paragraph Seventh, immediately after Rule 3.105 therein set forth, the following:

"3.106. No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control [2] with a network organization, [fol. 48] for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."

(e) By inserting on page 10 thereof, at the conclusion of paragraph Seventh, immediately after the sentence ending

"[2] The word 'control' as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

with the word "broadcasting" on the second line of said page, the following:

"The purpose, terms and effect of Rule 3.106 as construed by the Commission in its report (Exhibit B) are to require plaintiff to dispose of its Station WBT in Charlotte, N. C.; to raise serious doubts whether plaintiff will be permitted to continue its ownership of Stations WCCO in Minneapolis and WJSV in Washington; and to require plaintiff to dispose of its stations in any other locality where the Commission finds the existing standard broadcast stations to be so few or of such unequal desirability (in terms of coverage, power, frequency or other related matters) that competition would be substantially restrained by the licensing of plaintiff's stations."

(f) By inserting on page 14 thereof, at the end of paragraph Thirteenth, immediately after the words "Amendment V thereto", the following:

"and because it constitutes an abridgement of the freedom of speech and of the press contrary to Amendment I thereto."

and it is further

Ordered, that defendants' motion to dismiss the complaint or for summary judgment be deemed made against the complaint as so amended.

Dated, New York, N. Y. January 27th, 1942.

(Sgd.) Leonard Hand, U. S. C. J.; Henry W. Goddard, U. S. D. J.; John Bright, U. S. D. J.

[pages 49-216]

EXHIBIT B TO AMENDED COMPLAINT

[Omitted]

[fol. 221] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Upon the annexed verified Complaint and upon the Affidavits of William S. Paley and Herbert V. Akerberg, the plaintiff moves the Court as follows:

1. To convene for the purpose of hearing and determining this application and this cause, a statutory court of three judges at least one of whom shall be a circuit judge, in accordance with the provisions of Section 402 (a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C. § 402 (a)) and of the Urgent Deficiencies Appropriation Act (38 Stat. 219, 220; 28 U. S. C. § 47 (1913)).

2. To issue a temporary restraining order suspending and restraining the operation, enforcement, or execution of that portion of the order of the Federal Communications Commission dated May 2, 1941 (as amended by the order of October 11, 1941) which is specified in Paragraph Seventh of the Complaint in the above entitled action, pending the hearing upon the issuance of the temporary injunction sought hereinafter in this motion and the determination thereof.

3. To issue a temporary injunction suspending and restraining the operation, enforcement, or execution of that portion of the order of the Federal Communications Commission dated May 2, 1941 (as amended) which is specified in Paragraph Seventh of the Complaint in the above entitled action, pending the final hearing and determination of this cause.

The grounds of this motion, as more fully set forth in the annexed Complaint and in the annexed Affidavits of William S. Paley and Herbert V. Akerberg, are that:

a. The portions of the order of the Commission complained of are invalid.

b. The Commission, unless enjoined, threatens to enforce this order.

[fol. 222] c. The order and its enforcement are causing and will cause immediate and irreparable injury to the plaintiff.

d. Unless the operation and enforcement of the order be restrained pending final disposition of the action, the injury to plaintiff in the interim will be irreparable even by final judgment for plaintiff.

e. No injury will be sustained by the defendant or by the public through issuance of a temporary injunction and restraining order.

Signed: John J. Burns, Attorney for Plaintiff, Business and P. O. Address: 40 Wall Street, New York, N. Y.

Notice of Motion

To: The Federal Communications Commission
Washington, D. C.
The Attorney General of the United States
Washington, D. C.
The United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York, N. Y.

Please take notice that the undersigned will bring the above motion on for hearing before this Court on the 7th day of November 1941, at 10:00 A. M., or as soon thereafter as counsel may be heard, at Room 506 in the United States Court House, Foley Square, New York, N. Y.

Signed: John J. Burns, Attorney for Plaintiff. Business and P. O. Address: 40 Wall Street, New York, N. Y.

Dated: October 31, 1941.

[fol. 223] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

against

THE UNITED STATES OF AMERICA, Defendant

AFFIDAVIT OF WILLIAM S. PALEY, PRESIDENT OF COLUMBIA BROADCASTING SYSTEM, INC.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

WILLIAM S. PALEY, being duly sworn, deposes and says:

1. Deponent. I am the President of Columbia Broadcasting System, Inc. (hereinafter sometimes called "CBS" or "Columbia") and I have been its President since September 26, 1928. I am fully familiar with its organization, history, and the nature of its operations, and with the history and nature of radio broadcasting and particularly of "chain" or "network" broadcasting. This affidavit is for the purpose of obtaining a temporary restraining order and temporary injunction against the enforcement of a portion of the Order of the Federal Communications Commission (hereinafter called the "Commission"), set forth in paragraph "Seventh" of the complaint herein.

2. The Plaintiff. Columbia Broadcasting System, Inc. is a corporation organized and existing under the laws of the State of New York, and is engaged in the business of network broadcasting. It has been engaged in this business continuously since January 27, 1927, when its predecessor, United Independent Broadcasters, Inc., was organized. CBS has outstanding 1,716,277 shares of capital stock, listed and dealt in on the New York Stock Exchange and owned by over 8,000 stockholders. As appears from the balance sheet as of December 28, 1940, a copy of which is hereto annexed, marked Exhibit A, and made a part hereof, CBS has total assets in excess of $22,000,000, over $18,000,000 of which is devoted to network broadcasting, of [fol. 224] which $6,440,004.74 consists of fixed assets such as land, buildings and transmitters, and other physical assets.

In connection with the conduct of its network business, CBS operates, under license from the Commission, eight commercial broadcasting stations designated and known as WABC, New York; WJSV, Washington, D. C.; WBBM, Chicago; KMOX, St. Louis; WCCO, Minneapolis; KNX, Los Angeles; WBT, Charlotte, N. C.; and WEEI, Boston. All of these stations except WEEI, Boston, are owned by Columbia; WEEI is operated by Columbia as lessee of the property which is owned by the Boston Edison Company, Inc.

The business of network broadcasting consists of supplying programs to a number of broadcasting stations for simultaneous broadcasting. These programs are of two kinds, sustaining and commercial. Sustaining programs are programs containing no advertising which are furnished by the network to the stations at no direct cost. Commercial programs are those "sponsored" by an advertiser; for these programs the advertiser pays the network and the network in turn pays the station broadcasting the programs. Stations thus served by the network are known as its affiliates. At present the CBS network includes 123 American stations, 115 of which are independently owned affiliates, seven of which are owned by CBS, one of which CBS leases and operates, and all of which are licensed by the Commission. CBS programs are available to over 90% of the nation's entire night-time radio audience.

The operations of a network and of the stations affiliated with it are closely related and mutually dependent. A description of these operations and their interrelation is necessary to an explanation of the effect of the Rules complained of on broadcasting.

3. Physical Characteristics of Broadcasting; Role of the Federal Communications Commission. Broadcasting is accomplished by the generation, at the broadcasting station, of modulated radio waves, forming a part of the electromagnetic spectrum, which travel to receiving instruments which amplify them and translate them into audible sound waves. Radio waves vary in length and frequency. Because these waves impinge upon each other, the number of frequencies available for broadcasting is limited.

[fol. 225] The number of frequencies available for regular broadcasting (known as the standard broadcast band) is limited also because some frequencies must be kept out of

the standard band and made available for other classes of broadcast service for which there is a public need, such as international broadcast, radio telephone and telegraph service, marine, police, aviation, facsimile, amateur, experimental and other services. Moreover, the number of standard stations which can effectively broadcast without mutual interference is limited.

Because the unlimited and unregulated use of these limited facilities causes interference and confusion, and thereby prevents the public from receiving the full benefits of radio reception, Congress provided administrative machinery in the Commission, and its predecessor, the Federal Radio Commission, to apportion and license the use of these frequencies. The Commission is empowered to allocate frequencies to various classes of radio service, to license stations, to prescribe the physical type of the service to be rendered by them, and to designate their respective frequencies, power and hours of operation.

At the end of 1940 there were about 850 stations licensed by the Commission to operate as standard commercial broadcast stations, each on a designated wave length, with designated power, and for a designated time of the day.

4. Economics of Broadcasting; Need for National Networks. The American system of radio is based upon the use of the broadcasting stations for advertising purposes; i. e., the revenue of the station is derived from the broadcasting of programs on behalf of advertisers who pay for the use of the station's facilities. Advertising, as the basis for broadcasting service without cost to the listener, was not established by fiat. From among several methods of providing revenue to stations to enable them to operate and render a service to the public, the practice of selling radio time to advertisers developed as the best and most effective. The eventual success of this practice and the devolopment of network broadcasting are the foundations of the commercial structure of radio broadcasting today.

Individual broadcast stations derive their income from commercially sponsored programs, either of network or of local origin. Network commercial programs are sponsored by advertisers whose products are widely distributed, commonly known as national advertisers. Local commercial programs are of two distinct kinds: those sponsored by local advertisers and those sponsored by national

advertisers. When a local program is sponsored by a national advertiser it is known in the radio industry as a national spot program. National spot programs always originate at the studio of the local station, and are performed there for broadcast either by live talent or, more usually, by mechanically reproducing a recorded program which is known as a transcription. National network programs, on the other hand, are performed by live talent.

In addition to commercially sponsored programs, individual stations also broadcast sustaining programs. Sustaining programs are those programs which are broadcast by the station without sponsorship by any advertiser. The sustaining programs are broadcast by the station in order that it may present a continuous series of programs, attract a larger listening audience, serve the public interest, and build the station's goodwill. The quality of sustaining programs can be improved by the individual station when its revenues from advertising increase. A prosperous station is able to build and broadcast better programs of local interest to its community.

The sale of the station's time and facilities to local advertisers is made by the sales force of the station. The sale of the station's time and facilities to national advertisers for national spot broadcasts is made by organizations known in the industry as station representatives. These representatives are generally located in the cities where national advertisers, or advertising agencies which place their advertising, have their offices. Is is the custom and practice in the industry for the station to designate such a representative as its exclusive agent for the sale of the station's time and facilities for national spot advertising. The sale of the station's time to national advertisers for network broadcasting is made by the network with which the station is affiliated by contract.

While of course broadcasting rates for both network and local programs are influenced by the popularity of its programs and competition with other media for advertisers, the charge of a station for its time varies with the station, and depends in large part upon its "coverage", or the size of its regular listening audience. Coverage by a station depends upon a variety of factors, such as the power and [fol. 227] frequency which it is authorized to use, the density of the population and ownership of radio sets within its coverage area, and the quality of its programs. Affiliation

with a network or the lack of such affiliation substantially affects the quality of the station's programs.

Of the approximately 850 commercial standard broadcast stations operating in the United States, 495 were affiliated with one of the national networks at the end of 1940. In substance, this means that these stations looked to a network to supply them with programs, both commercial and sustaining, for a portion of their time; and also that they relied upon the network for the sale of a portion of their time.

Few stations in the country could themselves produce and offer the public the full program service which the American radio audience receives today. No station could have the aggregate of creative skills represented in a great network organization such as Columbia, or the economic resources, or the talent supplies. In the first place there is a concentration of performing talent in the metropolitan centers such as New York, Chicago and Los Angeles, and the available supply of talent outside such cities is insufficient to provide a continuous flow of varied program material. In the second place, individual stations are financially unable at their own expense, to plan, develop and offer to their listening audiences expensive entertainment programs, cultural programs such as concerts of the New York Philharmonic Symphony Orchestra, educational programs such as The Columbia School of the Air, and worldwide on-the-spot news coverage of foreign and domestic events of national importance. In the third place, advertisers cannot and do not finance programs of such quality for broadcasting on single stations, since the potential audience of single stations, which to the advertiser spells potential sales, is not large enough to warrant such expenditures. The needs of the stations and the manifested desires and tastes of the public led to the system of network broadcasting as a means of supplying these programs, and to the practice of affiliation by a station with a network as a means of obtaining these programs.

5. Network Broadcasting. CBS is one of the three organizations at present operating a nation-wide network system. The oldest network organization is National Broadcasting [fol. 228] Company, Inc. (hereinafter referred to as NBC), a wholly-owned subsidiary of Radio Corporation of America which was founded and began operating in 1926. It oper-

ates two network systems, known as the "Red" and the "Blue" networks, together having 214 affiliated stations at the end of 1940. The other network organization is Mutual Broadcasting System, Inc. (hereinafter referred to as Mutual), which was established in 1934 and which is largely controlled by the Chicago Tribune, a newspaper, and R. H. Macy and Company, a department store. At the end of 1940 there were 160 stations affiliated with Mutual.

Mutual's manner of operation differs from that of CBS and NBC. Mutual has no studios, maintains no engineering department, neither owns nor maintains any facilities for the production of programs and does not originate or produce a network program service such as is maintained by CBS and NBC. It is an organization devoted mainly to the sale of the time of its affiliated stations for network broadcasting to national advertisers. Its commercial programs are produced by the originating station or by the sponsor who buys time. Its sustaining (or non-commercial) programs are selected from among those produced by affiliated stations themselves, primarily as a part of the sustaining service of the stations for their own local listening audiences.

Network or "chain" broadcasting is defined by the Communications Act of 1934 as the "simultaneous broadcasting of an identical program by two or more stations". The business of operating a nation-wide network consists of supplying such programs of a general and national interest to a large number of radio stations. This is accomplished technically by transmitting the program over wires from a point of origination to each of the stations on the network. Programs are frequently picked up from a number of places in various parts of the world, brought to the central origination point of the network and thence transmitted to the stations. To conduct its business, the network sells the time of its affiliated stations to national advertisers. It contracts to obtain for the advertiser the use of the broadcasting facilities of such of the affiliates as he may select to broadcast the programs.

The normal operation of a national network includes the offering of a continuous flow of programs for a period of [fol. 229] from 16 to 18 hours a day throughout the week. In extraordinary times, during crises in domestic or international affairs, it is not unusual for networks to remain on

the air for 24 hours a day in order to be in a position to report events as they occur.

The wires over which the programs are transmitted to the stations are telephone wires of special quality furnished by the American Telephone & Telegraph Company. CBS contracts for program transmission service over wires of this quality for minimum of 16 hours per day at a cost of over $2,000,000 a year. Thus physical connections are maintained constantly between the network and the affiliated stations.

The network thus performs three major functions: the production of programs for its affiliates to broadcast, the distribution of these programs to its affiliates, and the sale of the time of its affiliates to advertisers.

Network Plant Investments and Program Expenditures

The property and financial resources required for such network operations are substantial. CBS now has (a) in its main office building at 485 Madison Avenue, New York City 12 studios and 128,000 square feet of office space spread over 21 floors of a twenty-four story building, (b) a recently completed special studio building on 52nd Street between Madison and Park Avenues in which are situated 8 additional studios, and (c) several theatres and assembly halls in other parts of New York City. In 1937 CBS completed the construction of outstandingly modern studios and accompanying office space in Los Angeles where there are 10 studios and 14,000 square feet of office space employed in network broadcasting. Similarly in Chicago and in Washington, D. C., where a large number of network programs originate, there are ample studio facilities representing substantial investments. Incidental to the operation of its local stations in St. Louis, Minneapolis, Charlotte and Boston, CBS also maintains studio facilities which are to a lesser degree utilized also as orginating points for network programs.

Because of the necessity of supplying a continuous flow of programs for 365 days a year, CBS has expended large sums of money in order to assure a steady supply of program material of the highest quality. Such expenditures [fol. 230] are essential if CBS is to conform to the standards of American network broadcasting which CBS itself has had a major part in developing. To assure the continu-

ance, for instance, of such an outstanding feature as the Sunday afternoon broadcasts of the New York Philharmonic Symphony Orchestra, it enters into a contract with that organization for a period of five years at $75,000 a year. To assure the coverage of world-wide news, it has employed and placed in numerous strategic points abroad news reporters and commentators of outstanding ability to make their observations and reports constantly available to CBS and its affiliated stations. Through its arrangements for continuous wire transmission service to the stations regularly affiliated with it, CBS is enabled on short notice to make it possible for the voice of the President of the United States, of United States senators and congressmen, of cabinet members, of spokesmen for the various political parties, and other speakers with messages important in the administration of government, to reach into the homes of more than 90% of the radio audience. In 1940 alone, CBS expended in excess of $5,000,000 on sustaining programs. By long term contracts for real estate, news services, special programs, and musicians, CBS stands committed to future payments in excess of $4,000,000. Moreover, CBS now reserves about 15 hours each week from sale, in order to present a wide variety of public service programs and other programs devoted to the development of new and improved ideas and techniques of broadcasting, in fields ranging from adult education to popular entertainment. These 15 hours reserved for special purposes by no means represent the total time devoted to sustaining programs.

CBS has taken the leadership in developing program standards which have raised the level of both sustaining and commercial programs. These standards have been enforced by CBS and have been continually improved practically since the beginning of network broadcasting. They were formalized in a statement which CBS published early in 1935 and have been enforced and amplified ever since. Because of its strict adherence to such high program standards CBS has refused over $6,000,000 of network business tendered to it in a period of four years. A copy of the statement of standards to which commercial programs on the CBS network are required to conform is hereto annexed, marked Exhibit B, and made a part hereof.

[fol. 231] 6. Assurance of National Circulation. Network broadcasting depends upon the use of networks as a med-

ium of advertising. To be useful to the national advertiser, the network must be able to provide him with an assurance of a nation-wide audience comparable to the assurance of nation-wide circulation provided by the visual media (magazines and other printed publications) having a national distribution. In order to create a national circulation for network programs, a network organization must make exhaustive surveys of the listening patterns for the individual stations affiliated with the network. The determination of network program circulation is itself complex beyond any comparison with that of printed publications. National circulation for radio programs can be guaranteed only when outlets are fitted together like a jigsaw picture, so that there are no interstices or "blind spots" between neighboring affiliated stations. Although the advertiser wishes to purchase a national circulation, he does not wish to spend money for superfluous outlets. It does not satisfy an advertiser to know that an outlet's signal is audible in a particular market—he wants to know that the outlet has a satisfactory audience there. Surveys of listening patterns made by Columbia from time to time, showing what outlets are preferred by listeners in particular areas, establish that Columbia's network programs are heard in the case of each outlet by an audience which is built up slowly but progressively over substantial periods of time. Columbia uses these surveys as a guide to perfecting the jigsaw picture of national network coverage, and particularly to determine which outlet is needed in a given area to serve the advertiser without uneconomic overlapping of coverage. If the makeup of Columbia's network were to lose its stability through the sudden advent and departure of affiliated stations, listening patterns would fluctuate wildly, and the circulation which today results from the constant performance together of scientifically chosen outlets would not exist. What circulation would be produced if the outlets of a network were in continual flux might not be measurable and the advertiser would be reluctant and very likely even unwilling to buy the immeasurable.

Definite assurance of a substantially nation-wide audience, fitting their own distribution and sales objectives, provides the incentive for advertisers to finance the production of the costly programs which the radio audience enjoys. [fol. 232] It will be seen that this definite assurance requires both that broadcasting stations be available to the network

when the network approaches the advertiser, and that the same broadcasting stations still be available when the advertiser finally selects a program period. Nor will the advertiser embark upon the costly venture of a nation-wide radio program series unless the relations between the network he selects and its affiliated stations are sufficiently stable so that he may reasonably expect to maintain his coverage and enjoy the cumulative fruits of his efforts to please the listening public and promote sales of his product.

This stability, fundamental to the practical existence of network broadcasting, has been achieved by the practice of the network and the station entering into a contract, known in the industry as an affiliation contract, pursuant to which the station becomes the network outlet in the station's service area. The provisions of the contract hereinafter described are indispensable to effective network broadcasting and to the fullest use of the radio facilities of the country.

The Affiliation Contract

Columbia's affiliation contracts are, in most cases, in the form shown in Exhibit "A", annexed to the complaint. The material provisions are substantially as follows:

(a) Columbia agrees to furnish to the station an average of at least 60 hours per week of network sustaining and sponsored programs.

(b) Columbia will furnish all available network sustaining programs without charge. It will furnish to the station all commercial programs which the sponsor requests the station to broadcast. In turn, the station will be paid a specified hourly rate for the use of its facilities in broadcasting network commercial programs. Usually this hourly rate paid to the station is graduated upward as specified totals of network commercial hours are successively attained by the station.

(c) The station will not broadcast programs from any other network, except that it may join occasional local, state, or regional hook-ups to broadcast special events of public importance.

(d) Columbia will not furnish its programs to any other standard broadcast station in the city in which the station is located, except in case of public emergency.

[fol. 233] (e) The station will, upon not less than 28 days' notice from Columbia, broadcast the commercial programs furnished to it by Columbia, provided that:

(1) The station need not broadcast such programs for more than 50 "converted hours" in any one week. A Converted hour is one night-time hour or two daytime hours.

(2) The station may substitute its own sustaining programs devoted to education, public service, or events of public interest, and

(3) The station may reject any network commercial program which it deems not in the public interest.

(f) The station is free to, but is not required to broadcast the network sustaining programs.

(g) The contracts are usually for a term of 5 years with Columbia having the right, in some instances, to terminate on 12 months' notice.

The foregoing contractual provisions embody the essential practices on which the structure of network broadcasting has been built. Preeminent among them are the network's call on the time of its affiliates (item (e) above) and the mutual exclusivity of affiliation (items (c) and (d) above). The importance to the industry of stability in network outlets, to compete with magazines and other publications for national advertising, has already been stated.

Contribution of Networks to American Broadcasting

Network broadcasting has been an important factor in the development of the broadcasting industry. Many improvements in engineering, in program quality, in the broadcasting of special events of national interest to larger audiences, and in the general character and ethics of the business, have been due to the network method of broadcasting. Network broadcasting made possible a wider reception than could have been obtained in any other way for expensive entertainment and cultural programs. Networks have taken the leadership in the development of programs and program standards, particularly in the matter of new program content in the fields of culture, education, news, and public debate. Network affiliation has been of great

[fol. 234] financial advantage to the affiliated stations. The advertiser and the listening public have expressed a decided preference for network as against local broadcasting.

During the entire period in which the standard affiliation practices have been usual and customary in the industry, broadcasting in America has grown remarkably both quantitatively and qualitatively. Its use as an advertising medium has flourished and both networks and network affiliates, as well as many unaffiliated stations, have found themselves on a sound economic basis.

During this period the revenues of affiliated stations, and their share of the revenue from network broadcasting, have increased substantially. The quality of radio programs, both local and network, has substantially improved both in content and variety. Networks and stations have expanded their coverage of the country and the size of the radio audience and the amount of listening have increased, while the cost per listener to advertisers for the use of the CBS network facilities has decreased. This growth of the use of the radio facilities of the nation could not have been accomplished without the practices of exclusivity and the call on time.

The Commission and its predecessor have at all times been aware of these practices, and of the provisions of the contracts concerning them. The licenses of all stations having such contracts with CBS have been renewed by the Commission and its predecessor semi-annually during this period, until August 1, 1939, since which time the licenses have been renewed annually. Since 1934 contracts between networks and affiliated stations have been filed by stations with the Commission and considered in connection with applications for renewal of their licenses, requests for increases in power and for new assignment of frequencies. Prior to the report of the Committee referred to below, these provisions to my knowledge have never been criticized or questioned by the Commission or its predecessor in any decision, order, release or any other public statement.

CBS, relying upon the validity and subsisting effect of these practices and agreements, has devoted over $18,000,000 of assets to network broadcasting. Neither the Commission nor its predecessor has ever claimed heretofore the power to regulate the contractual relationships between networks and their affiliated stations.

[fol. 235] 7. The Chain Broadcasting Investigation, Eventually Culminating in the Amended Order of October 1941. On March 18, 1938 the Commission, acting on its own motion and not upon a complaint or petition, adopted an order directing an inquiry by the Commission into "the contractual relationships between chain companies and network stations", and divers others matters. A Committee of three members of the Commission was appointed, and opened hearings in the fall of 1938, at which testimony was taken and exhibits were submitted. In June 1940, approximately one year after hearings closed, the Committee submitted a lengthy report to the Commission. The networks were heard orally and by brief, and in May 1941 a majority of the Commission rendered a printed Report accompanied by an Order containing eight Rules.

After the Commission issued its Report of May 1941, United States Senator Wallace H. White of Maine introduced a resolution to authorize a Senate Commit-ee to investigate the jurisdiction of the Commission to make its Order, and the reasonableness and effect of its Rules. Between June 2 and June 20, 1941 the Senate Committee on Interstate Commerce took the testimony of Chairman James Lawrence Fly of the Commission, and of representatives of all national networks and others, on the question whether Senator White's resolution should be adopted. I shall refer to the printed minutes of these hearings (U. S. Government Printing Office, Washington 1941, 628 pp.) as the "White Committee Hearing".

The Senate Committee adjourned subject to the call of its Chairman. Subsequently counsel for the Commission and its Chairman conferred with representatives of Columbia (which expressly did not waive its objections to the Commission's claim of power) and others. These conferences were without result. On August 14, 1941 Mutual petitioned the Commission to lift the prohibition against exclusive network option time by amending Rule 3.104. Upon this petition the Commission called for briefs and oral argument, but no further testimony, from interested parties, and invited them to discuss all the Rules incorporated in the Report of May 1941. Columbia and the other national networks filed briefs and made oral arguments to the Commission on September 12, 1941. Thereafter, on October 11, 1941, the majority of the Commission issued its Opinion on Rehearing, accompanied by an Order

[fol. 236] amending the Order of May and changing three of the Rules. The said Opinion On Rehearing and Order, and the dissenting opinion of Commissioners Case and Craven are attached as Exhibit "C" to the verified complaint.

That the approach of the Commission majority to the problems in the broadcasting industry was essentially one of academic unreality is evident from the central thesis pursued in the Report of May. This thesis is monopoly by Columbia and NBC. It may best be examined by turning to the Commission's conception of monopoly.

8. The Commission's Conception of "Monopoly"; Competition In "The Network-Station Market". The existing national networks are constantly engaged in vigorous competition for advertising sponsorship of commercial programs, for listeners who will build the goodwill of their outlets, and particularly for the best outlets in all the desirable markets. Every outlet which is affiliated with Columbia today has been free to change its affiliation upon at least one occasion since the formation of Mutual. There is a substantial turnover in the constituency of each national network. Every network makes overtures to stations under contract to competing networks to induce such stations to switch affiliations when their existing contracts expire.

The jurisdictional basis of the entire Commission Order as to chain broadcasting rests, I am informed by counsel and believe, upon the narrow and delicate stem of a single conclusion of fact—the Commission's own conclusion that the public would be better served by radio if existing affiliation practices were to be suppressed, thereby creating a new area of competition in what the Commission calls "the network-station" market.

At page 48 of its Report the Commission asserts:

"NBC and CBS contend that the networks compete, and compete vigorously. Certainly there is a considerable degree of competition among networks for advertisers and for listening audiences; but this does not mitigate the restraints found with respect to network-station relationships. In the radio broadcasting field, three different markets must be distinguished—the market in which networks and stations meet advertisers, the market in which net-

[fol. 237] works and stations meet listeners, and the intermediate or internal market where stations meet networks. It is in this intermediate network-station market that current practices have most directly restrained competition; no considerations of the extent to which the networks may compete for advertisers or listeners can conceal the extent to which they do not compete in the network-station market.

"The restraints which we here consider have not been achieved in either of the two more common ways—through coalescence of the networks or through coalescence of the stations. Rather, they have been achieved through coalescence of some stations with one network and other stations with another. But the result is nonetheless to destroy the free market and to substitute for interplay of competitive forces a sort of monolithic rigidity. Stations bound by the usual 5-year exclusive contracts are not free to bargain with other networks for programs; networks are not free to bargain with those stations for time; and the door is closed against new networks. The result is to restrict the flow of programs from producers to listeners."

Columbia's studies show that the flow of programs to listeners is steadiest when the identity of the outlet carrying the programs has become established. A change of outlets carrying a Columbia program upsets the listening patterns for that program, and it takes substantial periods of time before the listening patterns re-form around the new outlet.

This "network-station market" which the Commission is trying to create is not the familiar network-station market in which networks compete for contract affiliates. Instead, it is a market in which the networks would be in competition anew every time they sought outlets for a network program; where networks would engage in a sort of *over-the-counter, per program competition.* It is an abnormal market in which networks would compete, not for regular affiliates to carry all the network's programs, but for occasional outlets to carry particular programs. The Commission makes entirely clear that by "the network-station market" it means a market where networks compete not merely for contract affiliates but for outlets *on a per program basis.* Thus the Commission complains, in the excerpt quoted above that: "Stations

[fol. 238] bound by the usual 5-year exclusive contracts are not free to bargain with other networks *for programs;* [other] networks are not free to bargain with those stations for time;" and so a station which contracts with one network does not have constant access to the programs of every other network. At no time has the Commission been able to show that in creating this artificial market it is not, in obedience to a theory of its own, forcing the established major networks to cease being what they are today and to become something the precise nature of which no one can wholly foresee.

Again, by its October Opinion On Rehearing the Commission reiterates its desire, as stated in the Report of May, to create a new form of competition among networks on the basis of individual periods of the time of outlets. It says (Exhibit "C" to verified Complaint, p. 11):

"An exclusive option effectively removes a station from the station-network market with respect to all the time it covers. The Commission believes that such a serious restraint upon competition is inconsistent with the freely competitive system contemplated by Congress in the Communications Act of 1934. An exclusive option, to the extent that it encompasses the most valuable broadcast hours, approaches the effectiveness of the exclusivity clauses in affiliation contracts in denying other networks access to a station, and is therefore objectionable for many of the reasons given in the Report for the elimination of exclusive affiliation. Nor is the fact that a given network has utilized a particular period of time over a station any real justification for placing that time under exclusive option. The network which has a contract for a commercial program with a sponsor and which has been sending that program to a number of its affiliated stations throughout a season already has an almost insuperable advantage in selling that program for another year; for commercial program series are frequently renewed year after year. To permit such a network to have an exclusive option over its affiliated stations on the periods used for commercial network programs *would effectively destroy the possibility of competition for those periods.*" (Italics added.)

In the October Opinion on Rehearing the Commission once more criticizes exclusive option time because it "re-

[fol. 239] stricted *competition in network programs.*" (Italics added.)

This represent a brand new theory of competition for network programs such as never existed in the broadcasting industry. In the period before NBC adopted a formal affiliation contract, the outlet stations of NBC did not flit from network to network for their national network programs. There was never any such "network-station market." as the Commission has now visualized.

Solid reasons explain why economic forces operating in the real world of the radio industry have not produced any such market. National advertisers would not make use of the radio medium if it did not present a workable means of reaching a nation-wide audience. The instability attendant upon any over-the-counter market for network programs would remove that assurance of an orderly and well-defined national circulation which is fundamental to the existence of network broadcasting.

Under the present arrangement between Columbia and its affiliates, Columbia assumes the major risks incident to the relationship. Columbia already bears the risk of fluctuations in network commercial business by obligating itself unconditionally to deliver 60 hours of program service per week. Under its contract with affiliates Columbia is obligated to furnish a sustaining program service and in most cases to pay the cost of wire connections with the stations. This obligation must be discharged whether or not Columbia is able to sell to network advertisers the time of its affiliates. This obligation is particularly onerous in periods of economic decline for the radio business. Whatever the relation of commercial program volume to total network service, the 60-hour guaranty of service must be met, and so the cost of sustaining service must advance proportionately as the volume of commercial programs recedes.

9. The Commission's Order Puts An End to Affiliation Practices Essential to the Existence of Network Broadcasting. Taking the Commission's Order of May 2, 1941 and the amended Order of October 11, 1941 together, the Order promulgates eight Rules, five of which are questioned in this action. The Rules not questioned in this action do not subject Columbia to any present injury. The Rules attacked here restrict the right of stations to enter into affiliation contracts with CBS containing the provisions

[fol. 240] referred to in paragraph Fifth of the complaint, and in section "6" of this affidavit (page 11 hereof).

The effect of the challenged Rules will be to destroy efficient network broadcasting, reduce the number and quality of nation-wide programs, and make the country's largest and most powerful stations even more dominant at the economic expense of the smaller stations. Instead of carrying out the professed objective of the Commission, namely, the fullest and most effective use of the radio facilities of the nation, the Order will in fact impair and restrict their use, contrary to the public interest.

The Interdict Against Exclusivity

Rule 3.101 prohibits a station from entering into an agreement with CBS pursuant to which the station agrees that it will not accept network programs from any network except CBS. *Rule 3.102* prohibits a station from entering into an agreement with CBS to obtain CBS's exclusive services within the listening area of the station. These Rules prohibit mutual exclusivity of affilation between Columbia and its outlet stations. These Rules may well result in breaking up CBS as well as other national networks, and certainly will cause a contraction in the number of network programs, and a lowering in their quality and standards.

Rule 3.102 as amended in October forbids mutual exclusivity and then provides:

"This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization."

Only one station in each area could be given "the first call" upon Columbia's network programs; but the consideration flowing to Columbia for making that one station Columbia's outlet is today the ability to help that station build an audience and to sell that station's time for network commercial programs. *Rule 3.104*, as will be seen, destroys Columbia's opportunity to benefit by the bargain.

This one-way street apparently was devised by the Commission after it had found that under the Rules as promulgated it was impossible to meet the objection that, with no two-sided affiliation arrangement between network and

[fol. 241] stations, the best programs would gravitate to the most powerful stations and the weaker stations would be impoverished. But the Commission obviously expects established networks to grant this one-way option without any quid pro quo, while an unseemly reward is created for the mere adventurer in radio. Any irresponsible newcomer to the network field is left free to pick the choicest stations on all networks, while organizations with standards and character, having sizeable commitments, are asked to bind themselves to outlets often not the most desirable. This wholly artificial arrangement can only usher in twilight for the present network system.

The interdict against territorial exclusivity strikes directly at the stations. The majority of the more desirable Columbia affiliates have made their network affiliation a part of their identification to the public—to listeners through station announcements on network and non-network programs alike, to the commercial world by styling themselves *the* Columbia outlet in the territory upon their letterheads and in their industry advertising.

The covenant of the affiliated station to the network that the station will not, during the term of the affiliation contract, accept programs from a competing network provides an incentive for CBS to promote sale of the station's time to national advertisers, and protects CBS against the possibility that a competing network will be the beneficiary of the investment made by CBS in such promotion. It also provides the incentive for CBS to produce good sustaining features, to develop an audience for the station which will be of continuing interest to national advertisers. Exclusivity of affiliation permits the station to advertise itself as the CBS outlet in its area, and thus to take advantage of the national prestige of an established network.

The network advertiser wants the biggest continuous nation-wide audience he can obtain, at a reasonable price and with the assurance that he can retain it so long as his programs are popular. It is just this assurance which exclusivity tends to create.

Under the Commission's Rules the networks would have taken from them the opportunity and inducement to build circulation for themselves and their affiliates on a permanent basis. The Rules place the networks in the position that a newspaper or a magazine would be in if it could [fol. 242] build circulation only to share that circulation

with competitors, and if it had no certain stake in its own ingenuity, enterprise and character building.

The Prohibition Against Exclusive Options

Rule 3.104 contained in the order of May 2, 1941 prohibited the station from granting the network an exclusive option upon a certain portion of the station's time. It read:

"3.104. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time."

By the order of October 11, 1941 this Rule was amended to read:

"3.104. No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a.m. to 1 p.m.; 1 p.m. to 6 p.m.; 6 p.m. to 11 p.m.; 11 p.m. to 8 a.m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."

Rule 3.104 as amended continues the absolute prohibition against the giving by stations of exclusive options to networks, but provides that an "option", not exclusive against other network organizations, may be given by a station to national or regional networks (all the Rules are made applicable to regional networks as well) for the broadcasting of network programs during not more than three hours in each of the four segments into which the broadcast day is divided. The Order defines an "option" as

[fol. 243] "any contract, arrangement, or understanding, express or implied, between a station and a network organi-

zation which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time."

When a network's option upon the time of a station ceases to be "exclusive as against other network organizations", it ceases to be an option. It becomes a mere opportunity for the network to offer a program or program series to the stations and try to conclude a contract with enough stations in important markets to satisfy the advertiser. The Commission's October Opinion On Rehearing relates:

"The Commission is not convinced by the contention of NBC and CBS that the optioning of time by networks is indispensable to network operations, particularly since the chain broadcasting regulations, neither in their original form nor as herein amended, place any restrictions on the bona fide purchase of station time by networks. Networks have heretofore successfully operated without option time. However, it is clear that some optioning of time by networks in order to clear the same period of time over a number of stations for network programs will operate as a business convenience."

This "non-exclusive option" will not enable networks "to clear the same period of time over a number of stations for network programs". If Columbia's "option" during the period from 8 to 10 p.m. on a Tuesday evening means that the time of the outlets is available for Columbia's sponsor *provided* that five other network organizations (national and regional) do not make the station contracts first, then Columbia must contract with its sponsor subject to a sheer gamble that the time can be cleared and the advertising contract performed.

The prohibition of exclusive option time will make the clearing of time for the arrangement of a national network program an almost impossible task. Advertisers do not determine to use network broadcasting to sell their products only 24 hours prior to the time of the program. It sometimes takes months of planning, market study and research, [fol. 244] program planning and negotiations before an advertiser decides whether or not to use network broadcasting and thereafter what stations and programs to utilize. The

national advertiser must have nation-wide coverage, both because he sells nationally and because he must give substantially the same support to the distributor and the retailer in all parts of his territory. Advertising efforts must be carefully and scientifically planned. Frequently they are related to an advertiser's whole manufacturing and merchandising operations as much as a year in advance. Under such circumstances it is practically impossible to sell an advertiser the use of networks, a program idea, program talent and the like, when the network is not able to know and inform the advertiser in advance, what stations and what time the network has to offer; in short, what circulation he could get for the money he would spend. Under the Rule in question, the network might spend months of effort in convincing the sponsor, in helping him select the territory in which to broadcast his program, the stations to utilize, the character of the program, and the talent, and then find itself unable to provide either the stations or the time desired by the advertiser in the markets which he desires to cover.

It would be impossible in practice to operate a network such as that of CBS if CBS did not know in advance what circulation it could deliver, what stations it had to offer and what time on those stations was available for use by prospective advertisers. This is precisely the kind of assurance the visual media are able to provide and the kind of assurance which the advertiser requires before he is able to make any intelligent selection of his medium, before he does, in fact, select his medium.

Notice to Affiliates of Network Commercial Commitments

Existing contracts provide that the affiliate may require not less than 28 days' notice from the network before the affiliate will be called upon to broadcast a network commercial program. Amended *Rule 3.104* provides that the period of notice shall be increased to 56 days, and the Commission explains (Exhibit "C" to verified complaint, p. 8):

"This lengthening of the call period will give stations greater freedom in scheduling local and non-network na- [fol. 245] tional programs during the hours of the broadcast day which are subject to network option; for such programs, even though subject to be moved, may be assured

of at least eight weeks of continuous broadcasting. Nor does it seem that the increase in the call period will seriously affect national network business; for the national networks have pointed out that theirs is a long-range business and that large-scale national advertising network programs are usually planned and arranged for many months and even a year or two ahead of the actual commencement of the broadcasts. Under such circumstances, it does not appear that a 56-day call period will impose any serious hardship upon national network operations."

In the foregoing the Commission strikes a needless blow at the flexibility of the highly competitive network advertising business. I have already pointed out the frequent need for the ability to negotiate with advertisers well in advance with the assurance of being able to deliver if we make a sale. On the other hand, a variety of reasons in the industrial world will cause advertisers to desire to start an advertising campaign swiftly. Newspapers and magazines will continue to be able to accommodate such advertisers, whereas network broadcasting will be working under an unnecessary handicap which will weaken it in competition with other media and cause it to lose important business.

Minimum Network Service and Sustaining Programs

Of course under the Rules the network cannot agree, as it does now, to supply a minimum number of hours per week of network sustaining and sponsored programs, at a time when all certainty as to the outlets for network commercial programs is destroyed.

The sustaining program service provisions of the present contracts will go out because existing incentives for the production of sustaining programs will cease.

The inevitable result will be the decline of the networks as producers and suppliers of programs which the stations now receiving such programs are unable to provide for themselves. Thus networks are relegated principally to the role of time brokers, agencies for the sale to network advertisers of the time of such stations as will engage them to make such sales. It will enable anyone, without the necessity of having a network organization geared to [fol. 246] the production of network programs of quality, to buy wire connections and sell the time of whatever stations he can obtain, for any specific commercial programs.

Not being subject to the expense of operating an organization for the building of programs, with the investment which that entails, such agencies will be in a position to cut the rates to the advertiser, or to give to the station a greater share of the network revenue. Indeed it would be perfectly possible for such an organization both to cut the rates to the advertiser and to give the station a greater share of the revenue, as a result of operating without the trained personnel, the elaborate organization, the talent commitments, and all the other investments and expenses, which make possible the operation of a major network like CBS. The result of the Commission's Order will be to encourage irresponsible fly-by-night operations on a get-rich-quick basis and to prejudice the permanent and stable network system which now obtains.

Unlike Columbia, Mutual has no studios, maintains no engineering department and does not produce programs, except European news broadcasts. It is thus relieved of the expense incidental to such operations and to which CBS is now subject. Mutual is in a position, once these Rules take effect, to charge less than CBS or NBC for obtaining the use of the facilities of the same stations which CBS or NBC would be in a position to offer.

Moreover, unless the networks can be forced to adopt the one-way options to which I have adverted, these Rules will result in the best programs gravitating to the most powerful stations in each community. The lower powered and smaller stations will not then get the program service they now receive from their exclusive affiliation with one of the networks. The smaller stations, deprived of some of the better programs, will receive whatever programs cannot find a place on the larger stations; they will, therefore, encounter shrinking audiences, decrease in their revenue and the inevitable contraction in their public service. It should be emphasized that under the existing contractual arrangements Columbia has been able to maintain many of the less desirable stations as constituent parts of its network to the great benefit of these stations and their audiences. Such stations have been able to gain and hold substantial and often predominant audiences in their communities by virtue of Columbia's commercial and sustain-
[fol. 247] ing services. Extension of its network services to such stations has been profitable to Columbia so long as a common bond has existed between Columbia and the sta-

tions. This is the bond which the Commission is arbitrarily severing now.

With the loss of exclusive affiliation and of option time, the networks will be put in the position of being desperately compelled to maintain sales at all costs and therefore will not dare to enforce their present policies and practices or high program standards. Moreover, there must then be an end to the practice of withholding network time from sale in order to devote it to public purposes. Once the existing affiliate relationship is destroyed, networks will have "affiliates" only on a commercial basis, that is, only when and to the extent that the time of certain station- can be sold and cleared for commercial programs. In such circumstances it is difficult to see how network public service programs can ever be scheduled on a sustaining basis.

CBS is budgeting $500,000 a year for the operation of a Latin-American network. It is developing television at an annual expenditure of $800,000 a year. It is expending approximately $500,000 a year to cover every phase of the European war and the concurrent developments in America in relation to it. It derives absolutely no income whatever from the Latin-American network or television, and does not expect to derive any material income from these services for some time to come. A contraction in network income from the breakdown of the principle of exclusive affiliation and option time must certainly result in a contraction of these services which are today financed from current operations.

The Two-Year Limitation Upon Contracts

The duration of affiliation contracts, now usually five years, is fixed by *Rule 3.103* at two years.

As a matter of business necessity, the relationship between the network and the station must be of substantial duration if the network is to carry out its functions effectively. Since one of the principal functions of the network is that of making the facilites of stations available to the advertiser it is essential that it be assured that the facilities to be offered to prospective users be available for a substantial length of time. The printed national advertising media [fol. 248] have permanent assurance of the availability of advertising facilities. If networks are to compete on an equal basis with these media, they cannot be subject to the disadvantage of not being assured of facilities.

The network would not have been justified in making the substantial capital investment and large expenditures currently necessary for effective network operation, if it could not be assured of the availability of outlets for a substantial length of time. As the business is conducted today, long-term contracts and investments must be made to provide offices, studios, studio and technical facilities, et cetera. Moreover, not a single compensating advantage to the public would result from a short-term restriction.

Investments of the kind which an outlet must make cannot be justified on a temporary basis. The licensee of a station is able and willing, and usually eager, to make these long-term engagements because he has a reasonable expectation that his license will be renewed continuously. Station licenses have been regularly renewed by the Commission and its predecessor, the percentage of denials of renewals having been only a small fraction of one per cent of renewal applications. The rights of the public are adequately safeguarded by the present practice.

The Commission explains that in October it

> "concludes that a two-year affiliation contract will permit a reasonable measure of stability in network-station relationships without at the same time seriously interfering with competition in the network-station market. Of course, what precise limit on the duration of affiliation contracts is most desirable is a matter of judgment. A two-year affiliation contract represents a substantial diminution from the five-year term currently being utilized by NBC and CBS, and may be expected to remove that restraint upon competition and give freer play to competitive factors by making possible readjustments between stations and networks on a biennial basis."

But if networks are to engage in free-for-all competition on a per-program basis, with the first network which sells a particular period having the station as its outlet for that period, then affiliation has lost all its meaning and the contract period could as well have a twenty-year duration as a two-year one.

[fol. 249] Right of Stations to Reject Network Programs

Rule 3.105 prohibits the station from making any contract with a network which prevents the station from rejecting network programs which the station reasonably believes

to be unsatisfactory or unsuitable; or which prevents the station from rejecting a program already contracted for which, in the opinion of the station, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

If it is intended by this Rule to secure stations in their right to substitute sustaining programs of outstanding local or national importance for a network program, there can be no complaint concerning it. The CBS affiliation contract annexed to the complaint contains a provision which preserves this right. If, however, as its wording suggests, this Rule proposes to enable stations to reject network commercial programs which they have already agreed to accept, simply because the station prefers another commercial program, the Rule will discourage the use of networks by advertisers. Networks and sponsors incur substantial expenditures for wire transmission, studios, talent and the like. They are entitled to know that a station which has agreed to accept a program will not reject it in favor of the program of some other sponsor, justifying its breach of faith by invoking a Rule of the Commission. Under such circumstances sponsors would not contract for network time. Hence, this Rule will discourage the use of networks by advertisers.

Summary

The combined effect of the Rules complained of would be to destroy the present structure of network broadcasting. Burdens will be imposed upon that structure which will render it less able to meet the needs of the advertiser. A decline in the ability to meet the advertisers' needs will man a decline in the use of network broadcasting by advertisers and in consequence a reduction in the revenues. The result of this will be less program service, then fewer listeners, and so begins a descending spiral in revenues, rendering the stations less able to serve the public interest. The inevitable result of the Rules must therefore be to impair the full, effective and best use of the radio facilities of the country.

[fol. 250] Moreover, the Rules will compel CBS to alter fundamentally the structure and character of its business. In its present method of operation, CBS delivers sustaining programs to the station without direct charge for programs and in most instances without charge for telephone wires

to deliver them, and it shares the revenue from commercial programs with the station. CBS is compensated for the costs of producing its sustaining program service, and the cost of the wires necessary to deliver that service, by having the station as an exclusive affiliate, by having an option upon its time for network sales, and by its share of the revenue from network broadcasting. Under the Rules, the service provided to the station by CBS can no longer bring these compensations.

Finally, the broadcasting business is being thrown into confusion and uncertainty by the effect of the Rules upon advertisers, stations and networks. Some advertisers are uncertain and disturbed by the inability of the networks to assure availability of outlets. For this reason they are considering the diversion of their advertising expenditures to other media. Confusion and complications are attendant upon the wire arrangements to be made for program distribution under the Rules. The cost of permanent wire connections to all stations by any single network is prohibitive. There is no way of telling to which stations CBS should obtain permanent wire connections; the number and the cost of temporary wire connections cannot be determined.

There is confusion and uncertainty as to which stations will be connected by wire to which networks for purposes of national defense and national emergency. CBS has been unable to determine how and under what conditions sustaining programs will be delivered and to which stations. The Commission itself is unable to determine how networks will operate under the Rules as promulgated.

Networks are today the greatest and most expeditious means of mass dissemination of news, information and public discussion. They are peculiarly a vital factor of national defense in the present emergency. The inevitable uncertainty, chaos and confusion which the Rules will cause is contrary to the public interest.

10. Irreparable Injury. The Rules impair Columbia's freedom and ability to enter into the affiliation contracts [fol. 251] described in the complaint and in this affidavit. Chairman Fly has stated that any station which had such a contract after the effective date of the Rules would lose its license. As to existing contracts the Rules are to take effect November 15, 1941. In all other respects the Rules became effective May 2, 1941.

Breaches of Affiliation Contracts

Some stations having such contracts with CBS are refusing to renew them; some stations having such contracts are threatening to cancel or repudiate them and some stations have already cancelled or repudiated such contracts, on the ground that the Rules prohibit them. The stations are refusing to renew such contracts because of the drastic penalty for entering into contracts in violation of the Rules, in the event they are held to be valid.

Interference With Business Relations

Columbia is required to contract for adequate space, technical equipment and program material in advance in order to carry on its normal course of business. Because of the uncertainty as to whether it will obtain relief from these Rules, Columbia is now unable to contract and arrange for such program material, technical facilities and the like. The Commission's Order has already made advertisers doubtful of the continuance of network service, of the availability of network facilities and of the performance of the existing network-facilities contracts. This situation seriously jeopardizes Columbia's revenues, the orderly conduct of its business, and its ability to continue its present program policy and service.

Need for Interim Relief

Immediate injunctive relief is necessary to protect Columbia's business from disruption. A final adjudication, after a full fearing by this Court, that the Rules are invalid would, in the absence of interim protection, leave the plaintiff irreparably injured. Affiliated stations have already taken action jeopardizing Columbia's business and the continuity of its services, and advertisers have already indicated serious doubt as to the continuance of their present arrangements. Graver jeopardy is imminent. Not later [fol. 252] than the date when the Rules become applicable to existing contractual relations, existing values will be destroyed beyond repair.

Listeners will be lost and advertisers will be diverted to other media and in result the plaintiff will lose its goodwill, built up through its having furnished a regular, uninterrupted service for many years. Unless temporary relief maintaining the status quo until a determination of the validity of the Rules be granted, plaintiff's final relief

in this action will be futile. Since the industry has functioned with public approval for over fourteen years, and since no interest is harmed by its present operations, no injury will result from suspending the Rules until final disposition of this case.

William S. Paley.

Subscribed and sworn to before me this 30th day of October, 1941. Margaret E. Landry, Notary Public, Westchester County. Certificate Filed in N. Y. Co. Clk's No. 940, Reg. No. 2 L 573. Term Expires March 30, 1942.

(Here follows photolithograph, Exhibit "A" to Affidavit, side folio 253)

EXHIBIT "A" TO AFFIDAVIT

Columbia Broadcasting System, Inc. and Subsidiary Companies
Consolidated Balance Sheet as at December 28, 1940

Assets

Current Assets:		
Cash in banks and on hand	$7,570,151.01	
Notes and accounts receivable, less reserves for time discounts and doubtful accounts, December 28, 1940—$278,248.76, December 30, 1939—$150,937.44	3,829,081.35	
Inventories, at cost or market, whichever was lower	986,876.19	
Total Current Assets	$12,386,108.55	
Sundry Investments, Advances and Receivables, less reserves	$196,141.08	
Investments in and Advances to Affiliated Companies, less reserves	$69,351.00	
Prepaid Insurance, Taxes, Rents, Etc.	$531,182.93	
Fixed Assets, at cost:		
Land		$2,239,516.17
Buildings, equipment and improvements to leased premises		$7,908,124.03
Less—Reserves for depreciation and amortization		2,998,996.65
		$4,909,127.38
Fixed Assets, less reserves	$7,148,643.55	
Goodwill, representing premiums paid for capital stock of merged subsidiaries formerly consolidated	$2,000,115.94	
	$22,331,543.05	

Liabilities and Capital

Current Liabilities:		
Notes payable to banks	$200,000.00	
Accounts payable and sundry accruals	3,111,250.29	
Reserve for Federal income and excess profits taxes	2,425,000.00	
Mortgage instalments due within one year	155,800.00	
Total Current Liabilities		$5,892,050.29
Deferred Income		$29,689.34
Mortgages Payable (including $40,000 standing demand)		$1,421,350.00
Notes Payable to Banks, Due After One Year		$400,000.00
Reserve for Contingencies		$222,707.54
Capital and Surplus:		
Capital stock—$2.50 par value:		
Authorized—1,500,000 shares each Class A and B (Note 1)		
Issued — 960,203 shares of Class A and 948,674 shares of Class B at December 28, 1940	$4,772,192.50	
Capital surplus, representing excess of proceeds from sales of option stock over the par value thereof	146,809.20	
Earned surplus	10,502,414.82	
	$15,421,416.52	
Less—Cost of 2,850 shares of Class A stock and 189,750 shares of Class B stock reacquired and held in treasury	1,055,670.64	
Total Capital and Surplus		$14,365,745.88
		$22,331,543.05

[fol. 254] EXHIBIT "B" TO AFFIDAVIT

Statement of the Columbia Broadcasting System to the public, to advertisres, and to advertising agencies (May 15, 1935).

As radio broadcasting expands its audience and augments its influence, there devolves upon the broadcaster and the program sponsor an ever greater responsibility.

Similarly, as radio continues to become a more intimate force in the lice of people, they tend to be more sensitive to broadcasting they like and to broadcasting they do not like. It is incumbent upon the broadcaster constantly to examine general policy so as to assure steady progress in building and holding radio's audience. Such watchfulness serves the interests of the audience, of the advertiser, and of the broadcasting companies alike.

The Columbia Broadcasting System has given particular consideration to recent trends in two general types of commercial program: thise which are designed for children, and those involving unpleasant discussions of bodily functions, bodily symptoms, or other matters which similarly infringe on good taste. In ad-ition, as a result of expressed public interest, careful study has been given to the amount of time that should be used by sponsors for their advertising messages.

Children's programs

Wide variations in viewpoint exist among parents as to programs which they regard as suitable for their children to hear, and similar differences exist between parents and children. The same divergence of opinion is frequently found among authorities.

Commercial sponsors of broadcasts addressed to children are devoting great effort and much money to creating programs that merit the approval both of child and parent.

It is also true that there have been instances of poor judgment and careless execution. To eliminate such faults would be gratifying to all those who feel a deep repsonsibility for the rearing and education of impressionable youth.

The Columbia Broadcasting System has no thought of setting itself up as an arbiter of what is proper for children to hear; but it does have an editorial responsibility to the

[fol. 255] community, in the interpretation of public wish and sentiment, which cannot be waived.

In accordance with this responsibility we list some specific themes and dramatic treatments which are not to be permitted in broadcasts for children.

The exalting, as modern heroes, of gangsters, criminals and racketeers will not be allowed.

Disrespect for either parental or other proper authority must not be glorified or encouraged.

Cruelty, greed and selfishness must not be presented as worthy motivations.

Programs that arouse harmful nervous reactions in the child must not be presented.

Conceit, smugness, or an unwarranted sense of superiority over others less fortunate may not be presented as laudable.

Recklessness and abandon must not be falsely identified with a healthy spirit of adventure.

Unfair exploitation of others for personal gain must not be made praiseworthy.

Dishonesty and deceit are not to be made appealing or attractive to the child.

We realize that distinctions in aesthetic values and feeling which may be wholly obvious between two given treatments of dramatic material cannot always be easily specified in words. Thus, for instance, it is not easy to capture in definition the fine distinctions between the pure fantasy which comprises some of the world's greatest literature for children, and the fantastic distortion of realities which is unsuitable for a youthful audience. None the less, the differences between these forms of entertainment become rather obvious when the two are compared side by side.

A program for children of elementary school age should offer entertainment of a moral character in the widest social sense. It should not obtain its entertainment value at the cost of distorting ethical and social relationships in a manner prejudicial to sound character development and emotional welfare.

In general, it is worth noting that the literature for children which continues to find their favor through many generations offers heroes worthy of the child's ready impulse to hero worship, and of his imitative urge to pattern him-

[fol. 256] self after the hero model. Such literature, whether created 100 years ago or written today, succeeds in inspiring the child to socially useful and laudable ideals such as generosity, industry, kindness and respect for authority; it opens doors into wide worlds that may be reality or fantasy, but are in neither event ugly or repellent in aspect; it serves, in effect, as a useful adjunct to that education which the growing and impressionable child is absorbing during every moment of its waking day.

It is our hope and purpose to stimulate the creation of a better standard in children's programs than has net been achieved.

To be of assistance in reaching this goal, Columbia is engaging the services of an eminent child-psychologist who will have the benefit of an advisory board of qualified members, with the special purpose of pointing the way toward programs designed to meet the approval of parents, children and educators alike. Columbia hopes thus to be equipped to appreciate and apply the parent's practical point of view no less than to reflect studied scientific judgment. The name of this consulting authority, and the membership of this committee, will be announced soon; and the new policy becomes completely effective July 30.

Advertising Which Discusses Internal Bodily Functions, Symptons, etc.

The Columbia Broadcasting System has concluded, after serious consideration, to permit no broadcasting for any product which describes graphically or repellently any internal bodily functions, symptomatic results of internal disturbances, or matters which are generally not considered acceptable topics in social groups.

This policy will specifically exclude from the Columbia Network not only all advertising of laxatives as such, but the advertising of any laxative properties in any other product. It will further exclude the discussion of depilatories, deodorants, and other broadcasting which, by its nature, presents questions of good taste in connection with radio listening.

As to new business, this policy becomes effective immediately, May 15, 1935. As to existing business, it becomes effective as rapidly as present commitments with clients expire. The last of these expires in March, 1936. Meanwhile, the advertising continuities for any such product are

[fol. 257] to be so worded as to conform strictly with a specific standard of new requirements.

Many programs containing such advertising in the past have offered entertainment of great merit, judged by the strictest standards.

On the other hand, many people prefer not to hear such advertising over the radio, regardless of the excellence of the program. The reasons for this viewpoint is obvious: radio broadcasting is heard by mixed and assorted groups of all kinds, in the home, in restaurants, and in public meeting places. In certain groups a listener may find it distasteful to hear a discussion of some subject which under other circumstances he finds wholly fitting and proper.

Similarly, we realize that the personal and often intimate quality of the human voice, radio's medium of presenting its sponsors' messages, forbids discussing subjects on the air in a manner which might be wholly acceptable when read in type.

Commercial Announcements

In the last several years advertisers and agencies have themselves been responsible, in many instances, for the discovery that brief and skillful handling of the commercial announcement—rather than obviously excessive and insistent sales talk—creates effective response and universal commendation and good will.

The Columbia Broadcasting System recognizes, with many advertisers and with the public, the desirability of avoiding advertising announcements that are too lengthy or too frequent.

As a result, numerous advertisers have condensed their sales announcements to a marked extent, to their own satisfaction and the demonstrated approval of the listening audience.

With the interest of the audience and of the great majority of advertisers in mind, the Columbia Broadcasting System considers it desirable, at this time, to set the following maximum allowances for commercial announcements, effective July 30, 1935:

Evening Programs

A maximum of 10 per cent of the total broadcasting period may be devoted to the sponsor's commercial announcements,

[fol. 258] including contests and offers, on programs broadcast after 6:00 P. M. This applies to all full-hour programs, three-quarter hour programs, and half-hour programs. A single exception to the ten per cent ratio will be made on quarter-hour programs, on which an additional allowance not to exceed 40 seconds will be made in recognition of the fact that the short program necessarily requires as much time as the longer one for routine identification announcements.

The following table shows, in minutes and seconds, the maximum amount of commercial talk which will be permitted, under these limits, on programs of various lengths broadcast after 6:00 P. M.:

Full-hour programs:

All commercial announcements not to total more than

6 minutes

Three-quarter hour programs:

All commercial announcements not to total more than

4 minutes 30 seconds

Half-hour programs:

All commercial announcements not to total more than

3 minutes

Quarter-hour programs:

All commercial announcements not to total more than
2 minutes 10 seconds

Unpleasantly rapid delivery of the sales message, to effect a crowding of excessive material into the period allowed for the commercial announcement, will not be permitted.

Daytime Programs

The Columbia Broadcasting System has decided on a lesser curtailment of the amount of advertising in day-time programs for a number of reasons. Programs broadcast during the morning and afternoon hours serve vast numbers of women as a medium of useful information. Many

of these programs are educative in both cultural and prac-[fol. 259] tical fields. Many of them offer valuble help in solving household economic problems, discussion of which requires more detailed statement of the sponsor's service or product. To deprive the daytime listener of such discussion would subtract from the broad usefulness of radio broadcasting.

Sponsored programs in the daytime will accordingly be allowed a maximum of 15 per cent of the total broadcast period for commercial announcements, with an additional 40 seconds on the quarter-hour program.

Public Acceptance

We are satisfied that the best thought of many leading advertisers as well as of the broadcasting industry is reflected in these policies. They set higher standards than broadcasting has attempted before.

We have adopted them after years of experience and careful consideration of every aspect of the problems involved. For these new policies, we ask the full cooperation of the public, the advertiser and the broadcasting industry.

Basic Advertising Policies

The three important new policies set forth in the foregoing statement represents an extension of basic Columbia policies with which advertisers and advertising agencies have long been familiar, and which have served to maintain commercial broadcasting on the Columbia Network on a high ethical plane. These basic points of policy, most of which have been in effect since the inception of the Columbia Network, are here re-stated:

1. No false or unwarranted claims for any product or service.

2. No infringements of another advertiser's rights through plagiarism or unfair imitation of either program idea or copy.

3. No disparagement of competitors or competitive goods.

4. No lottery or "drawing contest." No contest of any kind in which the public is unfairly treated.

5. No programs or announcements that are slanderous, obscene, or profane, either in theme or in treatment.

6. No ambiguous statements that may be misleading to the listening audience.

[fol. 260] 7. Not more than two price mentions on a 15-minute program.

Not more than three price mentions on a half-hour program.

Not more than five price mentions on a full-hour program.

8. No advertising matter, or announcements, or programs which may, in the opinion of the System, be injurious or prejudicial to the interests of the public, the Columbia Broadcasting System, or honest advertising and reputable business in general.

9. No appeals for funds.

10. No testimonials which cannot be authenticated.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HERBERT V. AKERBERG IN SUPPORT OF THE MOTION OF PLAINTIFF COLUMBIA BROADCASTING SYSTEM, INC., FOR A PRELIMINARY INJUNCTION

I, HERBERT V. AKERBERG, being first duly sworn, do depose and say:

1. I am employed by the Columbia Broadcasting System, Inc., the plaintiff in this action, as Vice President in charge of Station Relations. I have been employed in this capacity since 1936. As Vice President I am in charge of and supervise the work of the Station Relations Department. From 1933 to 1936, I was General Manager of this department and my duties were substantially what they are now.

2. I have been employed in the broadcasting industry continuously since 1922. From 1922 to 1928 I managed and operated two broadcast stations in Columbus, Ohio. From 1928 to 1929 I was employed by the Bell Telephone Laboratories as Radio Installation Design Engineer. In that capacity, I designed and laid out the studios, the studio

equipment and the physical layout of the Columbia Broadcasting System. I was first employed by Columbia [fol. 261] Broadcasting System, Inc. in 1929, as Assistant Chief Engineer, became Chief Engineer about six months later and continued as such until 1931. In that capacity I supervised the technical operations of the network. From 1931 to 1933 I was relieved of administrative duties as Chief Engineer and devoted my time to studying methods of improving the physical and technical aspects of Columbia's network operations, and advising the affiliates on the improvement of their technical facilities.

3. The Station Relations Department of Columbia negotiates all contracts and renewals of contracts with broadcast stations for their affiliation with the Columbia network. It also administers the performance of these agreements by Columbia. This involves the furnishing of sustaining program service, the financial relations between Columbia and the stations, consultation with and advice to the stations on their engineering, sales, program, financial, public relations and other problems.

4. Since the department first came under my supervision in 1933, we have negotiated hundreds of affiliation contracts or renewals of existing affiliation agreements. Negotiations for affiliation of stations not yet affiliated with the network ordinarily require from three months to a year to be consummated; negotiations for renewal of expiring existing contracts ordinarily require from one to six months time.

In the ordinary course of business we begin to negotiate for the renewal of existing contracts from six months to a year prior to the date of determination of the contract. In some instances, where the circumstances require it, we have begun negotiations for the renewal of an existing contract as long as two years prior to its termination. Columbia has regular affiliation relationships with 115 stations licensed by the Federal Communications Commission; the termination dates of the contracts are staggered and the contracts terminate in different years and at different times during the year. The Station Relations Department is therefore continually engaged in commencing, continuing and completing negotiations with various stations for affiliation agreements or for the renewal of such agreements. On or about May 2, 1941 we were engaged in conducting negotiations with various affiliates for the renewal of their

affiliation agreements. The names of such stations and the [fol. 262] expiration dates of the contracts and of their licenses follow:

Station	Location	Contract Expiration Date	License Expiration Date
KFBB	Great Falls, Mont	Aug. 8, 1941	June 1, 1941
KGVO	Missoula, Mont	Aug. 8, 1941	June 1, 1941
CKAC	Montreal, Canada	Oct. 4, 1941	—
WHIO	Dayton, Ohio	Dec. 14, 1941	June 1, 1941
WIBX	Utica, N. Y	Dec. 31, 1941	Oct. 1, 1941
WISN	Milwaukee, Wisc	Dec. 31, 1941	June 1, 1941
WCHS	Charleston, W. Va	Feb. 13, 1942	April 1, 1942
WPAR	Charleston, W. Va	Feb. 13, 1942	Dec. 1, 1941
WMAZ	Macon, Ga	April 3, 1942	Feb. 1, 1942
WNBF	Binghamton, N. Y	April 4, 1942	Dec. 1, 1941
WHCU	Ithaca, N. Y	April 4, 1942	Feb. 1, 1942
WDBO	Orlando, Fla	April 14, 1942	April 1, 1942
WKBH	LaCrosse, Wisc	April 24, 1942	Aug. 1, 1941
KGMB	Honolulu	May 1, 1942	April 4, 1942
KHBC	Honolulu	May 1, 1942	Oct. 1, 1941
WWNC	Asheville, N. C	May 29, 1942	April 1, 1942
WDAE	Tampa, Fla	July 14, 1942	June 1, 1941
WMT	Cedar Rapids, Iowa	Dec. 31, 1942	April 1, 1942
KRNT	Des Moines, Iowa	Dec. 31, 1942	Aug. 1, 1941
WHAS	Louisville, Ky	Jan. 27, 1943	Feb. 1, 1942
WWL	New Orleans, La	Nov. 19, 1943	Feb. 1, 1942

Negotiations for the renewal of affiliation contracts had been progressing with these stations for some time. All of the contracts subsisting between Columbia and such stations, and for the renewal of which negotiations were proceeding between such stations and Columbia on or about May 2, 1941, contained clauses referred to in Paragraph Fifth of the Complaint in this action. These clauses have been the foundation of successful network operation and they are necessary to the continued existence of strong and successful network operation.

5. As a result of the Commission Order of May 2, 1941, negotiations with reference to the renewal of these agreements with the stations have been terminated because the order prohibits any licensee from entering into such contracts, under the penalty of the denial of the renewal of its license.

In addition the Station Relations Department has been negotiating with Station WGBR, Goldsborough, N. C., and Station WGTM, Wilson, N. C. for affiliation agreements of the kind specified in Paragraph Fifth of the Complaint. These negotiations have ceased because of the danger of the denial of their licenses if they should enter into such agreements. As the result of the Commission Order and its effect upon negotiation with stations for contracts or

[fol. 263] renewal thereof, the Station Relations Department has ceased functioning in these matters completely and is unable to continue the regular conduct of its business.

6. Not later than November 15, 1941 when the said Order becomes effective as to existing contracts,* all the existing contracts of affiliation between Columbia and licensees of the Commission must be abrogated or repudiated by these stations or they will face the certain denial of their licenses. As a result, many stations have threatened that they will cancel or repudiate their contracts of affiliation prior to the effective date of the said order, and many stations have already done so, as indicated by communications received from such stations, copies of some of which are hereto annexed and marked Exhibits "A" to "T", inclusive.

Herbert V. Akerberg.

Subscribed and sworn to before me this 29th day of October, 1941. Margaret E. Landry, Notary Public, Westchester County. N. Y. Co. Clk's No. 940, Reg. No. 2 L 573. Term Expires March 30, 1942.

Exhibit "A" to Affidavit

WADC Broadcasting Station

Basic Member Columbia Network

Akron, Ohio

May 20, 1941.

Columbia Broadcasting System, Inc.,
485 Madison Avenue,
New York, New York.

Gentlemen:

Reference is made to the contract dated June 4, 1938, between your corporation and me, governing the affiliation of my station, WADC, with your network.

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*Originally set for July 31, 1941, this effective date was postponed by the Commission, first to September 16, 1941, and later to such date as the Commission might fix. On October 11, 1941 the Commission issued a supplemental order fixing this effective date at November 15, 1941.

[fol. 264] Paragraph nine of that contract provides: "The obligations under this agreement are subject to all applicable laws, rules and regulations, present and future, especially including rules and regulations of the Federal Communications Commission."

You are, no doubt, familiar with the requirements enacted by the Federal Communications Commission May 2, 1941, numbered as sections 3.101 to 3.108 of the Rules and Regulations. Those requirements became effective on the date of their announcement and must be complied with within ninety days. As you know, the Commission's new regulations effectuate certain policies with regard to network broadcasting by imposing requirements upon licensees, rather than upon network organizations.

The impact of these regulations is such that any failure to comply with them will endanger my license and its renewal. Each section of the rules commences: "No license shall be granted to a standard broadcast station" etc.

Therefore, under the provisions of the Commission's new regulations and conformable to the provisions of paragraph nine above quoted, I must, to preserve my property, come to a clear understanding with you as to the changes in our relationship brought about by our new status and obligations under the regulations.

I have considered the question of whether or not my contract stands amended by operation of law, as might be considered provided by paragraph nine, and have come to the view that any such amendment, if it exists, is insufficient to protect my interests. Since the prohibition of the regulations extends against "any contract, arrangement, or understanding, express or implied", I am certain that specific exclusion must be had of any such arrangements.

My present contract violates the Commission's regulations in several important respects.

I shall, therefore, be compelled to cancel that contract and cease affiliation with your network unless it is now possible to work out a revision of the contract which will bring me within the requirements of the Commission.

Accordingly, I propose certain specific amendments to the contract.

Paragraph two of the contract provides as follows:

"2. The Station will broadcast all sponsored programs offered to it by Columbia during the time when the station [fol. 265] is licensed to operate, but need not (except in occa-

sional instances of sponsorship of special events, such as World Series broadcasts, not exceeding two weeks in duration at any one time) accept programs in excess of fifty 'converted hours' (as defined below, but computed, during the entire term of this agreement, on the basis of the differences in rates at different hours specified in Columbia's Rate Card No. 23) per week. The Station may require Columbia to give not less than twenty-eight days prior notice of the commencement of sponsored programs for new accounts. Either the Station or Columbia may on special occasions substitute for one or more of such sponsored programs sustaining programs devoted to education, public service or events of public interest without any obligation to make any payment on account thereof, and in the event of such substitution by either party, it will notify the other by wire as soon as practicable after deciding to make such substitution. In case the Station has reasonable objection to any such sponsored program or the product advertised thereon as not being in the public interest the Station may, on three weeks' prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the Station shall be satisfied. The Station will not make spot announcements in the 'break' occurring in the course of a single network program or contiguous programs for the same sponsor and will, at the request of Columbia, desist from making commercial spot announcements in the 'break' occurring before or after specified network programs."

This must now be changed to read:

"2. The Station will broadcast all sponsored programs offered to it by Columbia during the time when the station is licensed to operate and which, prior to the broadcasting thereof, have been accepted by the Station for broadcasting. The Station may require Columbia to give not less than twenty-eight days prior notice of the commencement of sponsored programs for new accounts. Columbia may on special occasions, substitute for one or more of such sponsored programs sustaining programs devoted to education, public service or events of public interest, without any obligation to make any payment on account thereof and in the event of such substitution Columbia will notify the [fol. 266] station by wire as soon as practicable after de-

ciding to make such substitutions. Nothing herein contained shall be understood or construed to prevent or hinder the station from scheduling programs before Columbia finally agrees to utilize the time during which such programs are scheduled, nor to require the station to clear time already scheduled when Columbia seeks to ultilize the time: Nothing herein contained shall be construed or understo-d with respect to programs offered pursuant to this contract to prevent or hinder the station from rejecting or refusing programs which the Station reasonably believes to be unsatisfactory or unsuitable or, with respect to Columbia programs, so offered and already contracted for, to prevent the station from rejecting or refusing any program which in its opinion is contrary to the public interest, or from substituting a program of outstanding local or national importance. The Station will not make spot announcements in the 'break' occurring in the course of a single network program of contiguous programs for the same sponsor and will at the request of Columbia desist from making commercial spot announcements in the 'break' occuring before or after specified network programs."

I suggest the elimination of the following language from paragraph five of the contract:

"and will maintain such licenses under copyrights as are necessary to enable the Station to broadcast the programs to be furnished by Columbia."

The second sentence of paragraph six provides:

"In the event of any change of programs, Columbia will notify the station as soon as possible, and the Station will make every effort immediately to conform with the substituted programs."

There should be added at the end of this provision the following additional language:

"subject, however, to all of the standards and requirements of paragraph two hereof."

Paragraph eight of the contract now provides as follows:

"8. Columbia will continue the Station as the exclusive Columbia outlet in the city in which the Station is located

and will so publicize the Station, and will not furnish its [fol. 267] exclusive network programs to any other station in that city, except in case of public emergency. The Station will operate as the exclusive Columbia outlet in such city and will so publicize itself, and will not join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations. The Station shall be free to join occasional, local, statewide or regional hook-ups to broadcast special events of public importance."

This must now be changed to read:

"Nothing herein contained shall mean or shall be construed to mean that the Station is in any manner prevented or hindered from or penalized for broadcasting the programs of any network organization other than Columbia. The Station asserts no rights under this agreement or otherwise to prevent or hinder Columbia from delivering all or any of its programs for transmission by any other station whatsoever."

Paragraph twelve must be so amended as to provide that the duration of the contract shall not exceed one year from the time that we have completed our negotiations for the amendments requested in this letter.

Please give this matter your immediate attention, as it is of importance to me in maintaining my license status that I effectuate the foregoing or equivalent amendments at the earliest moment.

Yours truly, Allen T. Simmons (Signed).

EXHIBIT "B" TO AFFIDAVIT

Radio Station WAIM

Anderson, S. C.

Business Office June 17, 1941.

Registered Mail

Mr. H. V. Akerberg, Vice-President,
Station Relations Department,
Columbia Broadcasting System, Inc.,
New York City.

DEAR MR. AKERBERG:

In reference to our Network affiliation contract between the Columbia Broadcasting System and Radio Station [fol. 268] WAIM which has been in effect since July 17, 1937, and on which there was recently exercised an extension option of six months by you, for the use of the facilities of broadcast station WAIM located at Anderson, South Carolina, we are assuming that this agreement will be continued and carried out on such a basis and in such a way as will fully comply with the chain broadcasting regulations promulgated by the Federal Communications Commission (F. C. C. Rules 3.101 to 3.108, inclusive) which, unless otherwise ordered, are to become effective on and after August 2, 1941.

If the effective date of the rules above referred to should be postponed, or if the rules mentioned should be amended or modified, then we assume that both you and we are to and will construe the agreement above mentioned in such a way as to comply with said rules.

So that our records may be complete in this connection, please acknowledge receipt of this communication at your earliest opportunity and oblige.

Cordially yours, (Signed) Wilton E. Hall, Owner.
Wilton E. Hall. CH.

Exhibit "C" to Affidavit

WRDW

"The Voice of Augusta"

Tenth & Broad Sts.

Augusta Broadcasting Company

Affiliated with Columbia
Broadcasting System, Inc.

Augusta, Georgia

June 25, 1941.

Mr. Stephen L. Fuld,
Columbia Broadcasting System,
485 Madison Avenue,
New York, N. Y.

Dear Steve:

I am writing to you with reference to the new Rules and Regulations of the FCC with regard to network affiliations [fol. 269] which will no doubt require that certain modifications be made in our present contract dated December 16, 1940 between the Columbia Broadcasting System and Augusta Broadcasting Company.

The effective date of these rules is, as you know, August 2, 1941 and up to this time no extension has been made. We are, of course, willing to accept and approve whatever contractual changes are necessary in order to conform with the requirements of the Federal Communications Commission and are most anxious that the necessary changes be made within the time limit designated by the Commission.

I have no doubt but that you are already working on this matter and that everything will be worked out in sufficient time.

Kindest personal regards.

Yours very truly, (Signed) Ray, W. R. Ringson.

WRR:jo.

EXHIBIT "D" TO AFFIDAVIT

Radio Station KDAL Columbia Broadcasting System Affiliate Serving Duluth Minnesota—Superior Wisconsin and Surrounding Territory

Bradley Building

Duluth Minnesota

(CBS)

June 19, 1941.

Columbia Broadcasting System,
485 Madison Avenue,
New York, New York.

Attention: Mr. Mefford R. Runyan

GENTLEMEN:

This letter is with regard to the regulations of the Federal Communications Commission affecting chain broadcasting promulgated by the Commission May 2, 1941.

Pursuant to these regulations in their present form, we would be deprived of our opportunity to receive a renewal [fol. 270] of license of KDAL from the Commission if we persisted in the present contractual relationship with your company.

We have reviewed carefully our relationship with the Columbia Broadcasting System and we hope that we can continue our relations in the future if it is now possible to make some modifications in the contract which will permit us to comply with the requirements of the Commission.

We would, therefore, welcome an opportunity to meet with the appropriate persons in your organization to effectuate the necessary revisions of the contract.

Inasmuch as there are only ninety days from May 2, 1941 within which to comply with the Commission's requirements, we feel that arrangements for the revision of our contract should begin at once.

We would appreciate it, therefore, if we may be notified of a convenient time and place for such conference in order that we may notify the Commission at the earliest possible date of our compliance with its regulations.

Red River Broadcasting Company, (Signed) by
Dalton Le Masurier, President.

EXHIBIT "E" TO AFFIDAVIT

WERC

"Erie's Radio Center"

Presque Isle Broadcasting Co.

C. B. S. Affiliate

Erie, Pennsylvania

June 9, 1941.

Columbia Broadcasting System, Inc.
485 Madison Avenue
New York City, New York

Attention: Stephen Fuld

GENTLEMEN:

We herewith tender you our notice of cancellation of our affiliation agreement to take effect August 2nd, 1941 in accordance with the new regulations of the Federal Communications Commission. However, we desire to negotiate a [fol. 271] new agreement in accordance with the new requirements of the Federal Communications Commission.

Very truly yours, Presque Isle Broadcasting Company, Radio Station WERC, (Signed) Charles E. Denny, General Manager.

CED:DC.

EXHIBIT "F" TO AFFIDAVIT

KARM

The George Harm Station

1333 Van Ness

Fresno, California

Hattie Harm, President
Clyde F. Coombs, Vice President and Manager

June 20, 1941.

Mr. Herbert V. Akerberg
Columbia Broadcasting System
485 Madison Avenue
New York, N. Y.

DEAR MR. AKERGERG:

In reference to our network affiliation agreement dated November 19, 1941 between KARM, The George Harm Station and the Columbia Broadcasting System, Inc., for the use of the facilities of Broadcast Station KARM, located at Fresno, California, we are assuming that this agreement will be continued and carried out on such a basis and in such a way as will fully comply with the chain broadcasting regulations promulgated by the Federal Communications Commission (F. C. C. Rules 3.101 to 3.108, inclusive) which, unless otherwise ordered, are to become effective on and after August 2, 1941.

If the effective date of the rules above referred to should be postponed, or if the rules mentioned should be amended or modified, then we assume that both you and we are to and will construe the agreement above mentioned in such a way as to comply with said rules.

[fol. 272] So that our records may be complete in this connection, please acknowledge receipt of this communication at your earliest possible opportunity.

Very truly yours, (Signed) Clyde F. Coombs, Vice President & Manager.

C:r.

Exhibit "G" to Affidavit

5000 watts WKNE C.B.S.

Keene, N. H.

June 18, 1941.

Columbia Broadcasting System,
485 Madison Ave.,
New York, N. Y.

Gentlemen:

Pursuant to the Federal Communications Commission order dated May 2nd, 1941, in Docket No. 5060 in the matter of the investigation of chain broadcasting, we hereby serve notice of cancelation of our network contract with you to take effect August 2, 1941 or upon any extension thereof by the Commission.

However, we desire to continue our network affiliation and are ready to negotiate a new agreement which will conform to the FCC order referred to above.

Very truly yours, Twin State Broadcasting Corporation, (Signed) H. C. Wilder, President.

HCW:D.

[fol. 273] Exhibit "H" to Affidavit

Scripps-Howard Radio, Inc.

Radio Station WNOX

Affiliated with

The Knoxville News-Sentinel

Knoxville, Tennessee

June 16, 1941.

Columbia Broadcasting System, Inc.,
485 Madison Avenue,
New York, N. Y.

Sirs:

In the light of new regulations issued by the Federal Communications Commission concerning network-station

agreements, dated May 2, 1941, we believe it will be necessary for us to meet and negotiate with you concerning changes which said regulations will require us to make in our agreement covering the affiliation of our Radio Station WNOX, Knoxville, Tennessee with your network.

Please advise us when an officer authorized to negotiate on behalf of our company may meet with you to discuss a new affiliation agreement which will enable our station to continue to operate as one of your affiliates and in compliance with all regulations of the Federal Communications Commission.

It will be necessary for us to reach a new agreement which will go into effect prior to the effective date of the new regulations of the Federal Communications Commission referred to above; or in the event of our failure to reach such a new agreement we hereby notify you of our intention to terminate our existing agreement as of the close of business on the day immediately preceding the effective date of said regulations.

Very truly yours, Scripps-Howard Radio, Inc.,
(signed) By R. B. Westergaard, Vice President.
Columbia Broadcasting System.

[fol. 274] EXHIBIT "I" TO AFFIDAVIT

KFAB KOIL KFOR

Central States

Broadcasting System

Omaha, Nebraska

N. Searle, General Manager.

June 19, 1941.

Mr. Herb Akerberg,
Columbia Bradcasting System,
485 Madison Avenue,
New York, N. Y.

DEAR HERB:

We have three chain broadcasting contracts with your company which require consideration since the adoption on

May 2nd of the so-called monopoly regulations (3.101 to 3.108) by the F. C. C.

We had anticipated that before this some meeting or arrangement would be inaugurated by your company for the purpose of discussing these contracts. In view of the fact that the Commission has limited the time for the compliance with their regulations to August 2nd we are taking this means of suggesting an early consideration of the present contracts with a view to negotiating new contracts which will conform in all respects to the spirit and the letter of the F. C. C. regulations.

For your information, the three contracts that we refer to are: the Affiliation Agreement of April 25, 1938 with Central States Broadcasting Company for KOIL: the original agreement entered into January 7, 1932 by KFAB Broadcasting Company and Columbia Broadcasting System and subsequent letters, making the agreement under which KFAB and WBBM are now operating; and the agreement dated June 12, 1939 between Columbia Broadcasting System and KFAB Broadcasting Company. Each of these contracts, in our opinion, require separate consideration and a new working arrangement will have to be negotiated in each instance.

[fol. 275] In view of the shortness of the time will you promptly advise us of your wishes so that we may get together. We will endeavor to meet with you at any reasonable time and place.

Very truly yours, (Signed) Don Searle, General Manager.

Don Searle/is.

EXHIBIT "J" TO AFFIDAVIT

KGLO

The Mason City Globe-Gazette Station

Mason City, Iowa

June 19, 1941.

Mr. John G. Gude,
The Columbia Broadcasting System, Inc.,
485 Madison Avenue,
New York City, New York.

DEAR MR. GUDE:

On examination of Rules 3.101 to 3.108, inclusive, it appears that your present network contract with us will be illegal after July 31, 1941.

We, of course, desire to continue our network affiliations with CBS, but we cannot afford to do so at the expense of our license.

In view of these new regulations, I would appreciate having you submit for our approval a new agreement which will comply with the present rules.

Sincerely yours, (Signed) F. C. Eighmey, Lee P. Loomis, Secy. & Treas.

FCE:RS.

[fol. 276] EXHIBIT "K" TO AFFIDAVIT

An Affiliated Station of the Columbia Broadcasting System

WREC Broadcasting Service

"The Voice of Memphis"

Memphis, Tenn.

June 24, 1941.

Columbia Broadcasting System, Inc.,
485 Madison Avenue,
New York, N. Y.

Attention: Mr. H. V. Akerberg, V. P. Station Relations

GENTLEMEN:

In reference to the Agreement between Columbia Broadcasting System, Inc. and WREC, incorporated, dated De-

cember 13, 1933, as amended by letter agreements dated December 15, 1937 and June 6, 1939 and September 21, 1940, for the use of the facilities of Broadcast Station WREC at Memphis, Tennessee, we are assuming that this Agreement, and all extensions thereof, will be continued and carried out on such a basis and in such a way as will fully comply with the chain broadcasting regulations promulgated by the Federal Communications Commission (F. C. C. Rules 3.101 to 3.108, inclusive) which, unless otherwise ordered, are to become effective on and after August 2, 1941.

If the effective date of the rules above referred to should be postponed, or if the rules mentioned should be amended or modified, then we assume that both you and we are to and will construe the Agreement above mentioned in such a way as to comply with said rules.

So that our records may be complete in this connection, please acknowledge receipt of this communication at your earliest possible opportunity.

Very truly yours, (Signed) Hoyt B. Wooten, WREC Broadcasting Service.

Hoyt B. Wooten :ga.

[fol. 277] Exhibit "L" to Affidavit

Miami Broadcasting Company

WQAM

Miami

Affiliated with Columbia Broadcasting System

June 24, 1941.

Columbia Broadcasting System, Inc.,
485 Madison Avenue,
New York, N. Y.

Attention: Mr. Herbert Akerberg, Vice President in Charge of Station Relations

Dear Mr. Akerberg:

The Federal Communications Commission, on May 2, 1941, adopted an order in Docket No. 5060 which affects the

existing contract between the Miami Broadcasting Company and the Columbia Broadcasting System. Pursuant to this order, the Miami Broadcasting Company is herewith giving notice that it is canceling the existing contract between it and the Columbia Broadcasting System, effective on August 2, 1941, or on such other date as the Commission may designate as the effective date of the order. However, the Miami Broadcasting Company is desirous of continuing its affiliation with the Columbia Broadcasting System and receiving both commercial and sustaining programs from you. We are, therefore, prepared and willing to negotiate a new contract that will conform in every way with the new Rules and Regulations of the Federal Communications Commission and, at the same time, permit Station WQAM to continue its affiliation with Columbia.
A copy of this letter is being filed with the Federal Communications Commission.

Very truly yours, Miami Broadcasting Company,
(signed) F. W. Borton, President.

FWBet.

[fol. 278] EXHIBIT "M" TO AFFIDAVIT

Owned and Operated by KOMA Incorporated

Biltmore Hotel

KOMA

Oklahoma City's CBS Station

June 24, 1941.

Columbia Broadcasting System
485 Madison Avenue,
New York, N. Y.

Re: F.C.C. Form 335, Supplement concerning Chain Broadcasting to Application for Standard Broadcasting Authorization

GENTLEMEN:

We have completed forms #335 and attached supplemental material and forwarded it to Spearman, Sykes & Roberson, Attorneys at Law, Munsey Building, Washington, D. C.

to be filed with the Federal Communications Commission. In this connection we have furnished with those completed forms copies of our contract with the Columbia Broadcasting System and have set forth in letter of transmittal to the Columbia Broadcasting System and have set forth in letter of transmittal to the Federal Communications Commission in which we have made statement as follows:

"In view of the clause in our contact with the Columbia Broadcasting System which provided that the contract shall be subject to all applicable rules and regulations of the Federal Communications Commission, we construe our contractual relations with Columbia to have been modified so as to comply with the new network rules of the Commission to the extent that said contract may be inconsistent or in conflict with the provisions of said rules."

Very truly yours, KOMA, Incorporated, (Signed) by Bryan Mathes.

BM*BJ.

[fol. 279] EXHIBIT "N" TO AFFIDAVIT

Edgar L. Bill, President

Columbia Broadcasting System

"On The Air" Eighteen Hours Daily

Peoria Broadcasting Company

WMBD "from the Heart of Illinois"

Office and Studios, Alliance Life Building,

Peoria, Illinois

June 3, 1941.

Columbia Broadcasting System,
485 Madison Avenue
New York, N. Y.

DEAR FRIENDS:

We are at this time filling in F.C.C. Form #335 to supplement our application for renewal of license which is now

in the hands of the Commission. As you know, this form calls for information about our contract with you.

In view of the fact that our present contract with you would prohibit our getting a renewal of license according to the new F.C.C. regulations numbers 3.101, 3.102, 3.103, 3.104, 3.105, 3.106, 3.107 and 3.108, we are therefore notifying you that we desire to take advantage of Clause 9 in our contract with you, as of August 1, 1941.

It is our desire that we be released of all obligations in our present contract contrary to the new F.C.C. ruling as of August 1, 1941. You will please verify this letter in writing so that we can file copies of this letter and your answer with the Federal Communications Commission, along with Form #335.

Thank you.

Very truly yours, (Signed) Edgar L. Bill.

Edgar L. Bill. IK.

[fol. 280] Exhibit "O" to Affidavit

The Agricultural Broadcasting Company

Burridge D. Butler, President. Glenn Snyder, Manager

Tel. Monroe 9700

WLS

Clear Channel—50,000 Watts—890 Kilocycles

Washington Blvd., Chicago

June 24, 1941.

Mr. J. G. Gude,
Columbia Broadcasting System,
485 Madison Avenue,
New York, N. Y.

Dear Jap:

Your office will receive shortly, if it has not already arrived there, a letter from KOY cancelling our CBS affiliation in accordance with the August 2nd dead-line, and offer-

ing to renegotiate to make our contract conform to any FCC orders, in case it does not already do so.

That letter was occasioned by the fact that, as you know, the Commission has ordered stations to file this new Form 335 where they have any pending application. We have an application pending in the Commission for 5 KW day. Loucks advised us that when we filed that form, we should file this letter simultaneously with it, in order that we wouldn't be held up by a further exchange of conversation on that subject.

I don't know that this formality, if it is that, is necessary, but he is handling the application and thought it advisable so we acted accordingly.

I wanted to write you this, so that when it came in, you would know what prompted it.

Yours very truly, (signed) Glenn.

GS'L.

[fol. 281] Exhibit "P" to Affidavit

KTUL

Columbia Broadcasting System Affiliate

Tulsa, Oklahoma

June 21, 1941.

Mr. Herbert V. Akerberg
Columbia Broadcasting System
New York City

Dear Mr. Akerberg:

In view of Paragraph 9 in our agreement with the Columbia Broadcasting System, Inc., which provides that the contract shall be subject to all applicable rules and regulations, present and future, of the Federal Communications Commission, we construe our contractual relations with Columbia to have been modified so as to comply with the new network rules of the Commission to the extent that said contract may be inconsistent, or in conflict, with the provisions of said Rules.

Yours very truly, Tulsa Broadcasting Co., Inc., (Signed) Wm. C. Gillespie, Vice President & General Manager.

WCG:ss
Registered mail.

EXHIBIT "Q" TO AFFIDAVIT

WIBX

"The Voice of the Mohawk Valley"

Columbia Broadcasting System Affiliate

Utica, New York

July 8, 1941.

Columbia Broadcasting System,
485 Madison Avenue,
New York, N. Y.

GENTLEMEN:

The Federal Communications Commission on May 2, 1941, adopted an order in Docket No. 5060 promulgating [fol. 282] certain regulations which have a direct bearing upon the present affiliation agreement between WIBX Incorporated (Station WIBX), Utica, New York, and your Company.

The purpose of this letter is to give you notice that on August 2, 1941, or on such other date as the Commission may fix as the effective date of its order, WIBX Incorporated will consider its affiliation contract with your Company as cancelled.

However, it is the desire of WIBX Incorporated to continue to receive both commercial and sustaining programs from the Columbia Broadcasting System after the effective date of the order, and we are now prepared and willing to enter into a new arrangement which will be consistent with the new regulations of the Commission.

We are filing a copy of this letter with the Commission along with Form No. 335 in order that it may be considered in connection with our pending application for renewal of the Station license.

Respectfully yours, WIBX Incorporated, (signed) Elliott Stewart, Executive Vice President.

ES:MC.
Send by Registered Mail.

Exhibit "R" to Affidavit

570 LC. 5,000 Watts Day, 1,000 Watts Night

WNAX

Affiliated with Columbia Broadcasting System

Broadcasting Company

Studios and Offices Also in Sioux City, Iowa

Yankton, South Dakota

June 12, 1941.

Columbia Broadcasting System
485 Madison Avenue
New York, New York

Attention: Mr. Mefford Runyon.

Gentlemen:

You are, no doubt, familiar with the regulations of the Federal Communications Commission affecting chain broadcasting as promulgated by the Commission May 2, 1941. [fol. 283] Under these regulations in their present form, we would be deprived of our opportunity to receive a renewal of license of WNAX from the Commission should we persist in the present contractual relationship with your company.

We have made a careful study of our relationship with Columbia and are hopeful that we can continue our present and satisfactory business relations in the future if it is now possible to make some modifications in the contract which will permit us fully to comply with the Commission's requirements.

We should like to meet with the appropriate persons in your organization for the purpose of effectuating the necessary revisions of the contract.

Since we have only ninety days, from May 2, 1941, to place ourselves on the basis of full compliance with the Commission's requirements, we feel that conferences looking toward the revision of our contract should commence at once.

We should, therefore, appreciate it if you will notify us of some convenient time and place for holding such conferences in order that we may, at the earliest opportunity, report to the Commission our compliance with its regulations.

Your truly, WNAX Broadcasting Company, Luther L. Hill (signed), by Luther L. Hill, Vice-President. LLH/lj.

EXHIBIT "S" TO AFFIDAVIT

KSFO

The Associated Broadcasters, Inc.,

Palace Hotel, San Francisco, California

W. I. Dumm, President. June 28, 1941.

Columbia Broadcasting System, Inc., 485 Madison Avenue, New York, N. Y.

Attention: Mr. H. V. Akerberg, Vice Pres.

GENTLEMEN:

In reference to our network affiliation agreement dated June 26, 1936, between The Associated Broadcasters, Inc., [fol. 284] and Columbia Broadcasting System, Inc., for the use of the facilities of Broadcast Station KSFO, located at San Francisco, California, we are assuming that this agreement will be continued and carried out on such a basis and in such a way as will fully comply with the chain broadcasting regulations promulgated by the Federal Communications Commission (F. C. C. Rules 3.101 to 3.108, inclusive) which, unless otherwise ordered, are to become effective on and after August 2, 1941.

If the effective date of the rules above referred to should be postponed, or if the rules mentioned should be amended or modified, then we will assume that both you and we are to and will construe the agreement above mentioned in such a way as to comply with said rules.

So that our records may be complete in this connection, please acknowledge receipt of this communication at your earliest possible opportunity.

Respectfully yours, (Signed) W. I. Dumm, President.

Exhibit "T" to Affidavit

WKBN Broadcasting Corporation, 17 North Champion Street, Youngstown, Ohio

Associated Station of The Columbia Broadcasting System

June 19, 1941.

Columbia Broadcasting System, 485 Madison Avenue, New York, N. Y.

Attention: Mr. J. G. Gude, Mgr., Station Relations Department

Gentlemen:

The Federal Communications Commission on May 2nd, 1941, adopted an order—Docket No. 5060, which order is effective on August 2nd, 1941, which affects the affiliation agreement between WKBN Broadcasting Corporation and the Columbia Broadcasting System.

[fol. 285] Please take notice that, pursuant to this order, WKBN Broadcasting Corporation is cancelling its contract with Columbia—the cancellation to become effective on August 2nd, 1941, or on such other date as the Commission may determine to be the effective date of that part of the order which affects our relationship. However, we desire to continue as an affiliate of Columbia, and are now prepared and are willing to enter into a new or different arrangement with you which will be consistent in every way with the new order and regulations.

Please acknowledge receipt of this letter, a copy of which is being filed with the Commission.

Yours very truly, WKBN Broadcasting Corporation, W. P. Williamson, Jr. (signed), President. W. P. Williamson, Jr. W.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF KENNETH L. YOURD

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

KENNETH L. YOURD, being duly sworn, deposes and says:

1. I am an attorney employed by Columbia Broadcasting System, Inc. (hereinafter sometimes called "Columbia") in its Washington, D. C. office, and have been employed by Columbia since April, 1941. I am generally familiar with the Rules and Regulations of the Federal Communications Commission, and with its practice of issuing broadcast station licenses.

2. On January, 1942 I inspected records of the Commission at its office in Washington, D. C. relating to the dates of expiration of the Standard Broadcast station licenses of the stations on the Columbia network. Such records showed [fol. 286] that the licenses of the following stations will expire on February 1, 1942:

WABC	New York	WLAW	Lawrence, Mass.
WKBW	Buffalo	WMAZ	Macon, Ga.
WBBM	Chicago	WCCO	Minneapolis-St. Paul
WCKY	Cincinnati		
WJR	Detroit	WLAC	Nashville
KFAB	Lincoln	WWL	New Orleans
WHAS	Louisville	KOMA	Oklahoma City
WCAU	Philadelphia	WRVA	Richmond
KMOX	St. Louis	KSL	Salt Lake City
WJSV	Washington	KWKH	Shreveport
WGPC	Albany, Ga.	KNX	Los Angeles
WBT	Charlotte	KQW	San Francisco-San Jose
KRLD	Dallas		
WHCU	Ithaca	KIRO	Seattle;
WNOX	Knoxville		

that the licenses of the following stations will expire on April 1, 1942:

WCAO	Baltimore	WTAD	Quincy, Ill.
WEEI	Boston	KTSA	San Antonio
WMT	Cedar Rapids	WGBI	Scranton
WPRO	Providence	WNAX	Sioux City-Yankton
WWNC	Asheville		
WCHS	Charleston, W. Va.	WSPA	Spartanburg, S. C.
KLZ	Denver	WDAE	Tampa
KROD	El Paso	WIBW	Topeka
WMMN	Fairmont, W. Va.	WMBS	Uniontown, Pa.
		KWFT	Wichita Falls, Tex.
WKZO	Kalamazoo		
WREC	Memphis	WKBN	Youngstown
WCOC	Meridian, Miss.	KFPY	Spokane
WQAM	Miami	KGMB	Honolulu
WDBO	Orlando	WKAQ	San Juan, Puerto Rico;
KOY	Phoenix		
WGAN	Portland, Me.		

[fol. 287] that the licenses of the following stations will expire on June 1, 1942:

WHIO	Dayton	WJAS	Pittsburgh
WFBM	Indianapolis	KGGM	Albuquerque
KMBC	Kansas City	WDOD	Chattanooga
KOIL	Omaha	KVOR	Colo. Springs
KFBB	Great Falls, Mont.	KGVO	Missoula, Mont.
		WDBJ	Roanoke
KTRH	Houston	WTOC	Savannah
WKNE	Keene, N. H.	WSBT	South Bend
KGLO	Mason City, Iowa	WORC	Worcester
		KOIN	Portland, Ore.;
WISN	Milwaukee		

that the licenses of the following stations will expire on August 1, 1942:

WADC	Akron	WTAQ	Green Bay, Wis.
WOKO	Albany	WBIG	Greensboro, N. C.
WGAR	Cleveland		
WBNS	Columbus	KLRA	Little Rock
KRNT	Des Moines	WBRY	New Haven-

WHP	Harrisburg		Waterbury
WDRC	Hartford	WMBD	Peoria
WHEC	Rochester	KTUL	Tulsa
WFBL	Syracuse	KFH	Wichita;
WCSC	Charleston, S. C.		

that the licenses of the following stations will expire on October 1, 1942:

WAIM	Anderson, S. C.	KVSF	Santa Fe
WABI	Bangor	WIBX	Utica
WCAX	Burlington	WJNO	W. Palm Beach
WRBL	Columbus, Ga.	KARM	Fresno
WCOV	Montgomery	KROY	Sacramento
WFOY	St. Augustine	KHBC	Hilo, H. I.;

that the licenses of the following stations will expire on August 1, 1943:

WEOA	Evansville, Ind.	KTUC	Tucson
WMBR	Jacksonville	WKWK	Wheeling;

[fol. 288] that the licenses of the following stations will expire on October 1, 1943:

WPAR	Parkersburg, W. Va.	WMAS	Springfield, Mass.;

that the licenses of the following stations will expire on December 1, 1943:

WBAB	Atlantic City	KDAL	Duluth
WRDW	Augusta, Ga.	WDNC	Durham
WNBF	Binghamton	WERC	Erie;

and that the licenses of the following stations are issued on an indefinite, temporary basis:

WGST	Atlanta	WAPI	Birmingham

3. On January 3, 1942 I obtained from the United States Department of Justice, in Washington, D. C., a copy of the complaint in a civil action in the District Court of the United States for the Northern District of Illinois, Eastern Division, entitled "United States of America, Plaintiff v.

Columbia Broadcasting System, William S. Paley, Edward Klauber, and Herbert V. Akerberg", a copy of which is hereto annexed, marked Exhibit A.

Kenneth L. Yourd.

Subscribed and sworn to before me this 5th day of January, 1942. George A. Burwell, Notary Public. N. Y. Co. Clk's No. 527, Reg. No. 3B800. Kings Co. Clk's No. 119, Reg. No. 3459. Bronx Co. Clk's No. 62, Reg. No. 248B43. Queens Co. Clk's No. 2167, Reg. No. 8330. Certificates filed in Westchester and Richmond Counties. Commission Expires March 30, 1943. (Seal.)

[fol. 289] Exhibit "A" to Affidavit of Kenneth L. Yourd

In the District Court of the United States for the Northern District of Illinois, Eastern Division

Civil Action No. —

United States of America

v.

Columbia Broadcasting System, William S. Paley, Edward Klauber, and Herbert V. Akerberg

Complaint

The United States of America, by J. Albert Woll, its attorney for the Northern District of Illinois, Thurman Arnold, Assistant Attorney General, and Victor O. Waters, Special Assistant to the Attorney General, acting under the direction of the Attorney General, files this complaint against the following named defendants and complains and alleges upon information and belief as follows:

I

Defendants

1. That the Columbia Broadcasting System, hereinafter referred to as CBS, a corporation organized and duly authorized to do business under the laws of the State of New York, is made a defendant herein;

2. That the following individuals, officers, or directors of the corporate defendant, are named as defendants herein; that they have during the period covered by this Complaint actively engaged in the management, direction and control of the affairs and policies of the corporate defendant and in particular those affairs and policies which are covered by this Complaint, and have authorized, ordered and done the acts of the defendants constituting the offenses hereinafter charged;

William S. Paley, President and member of the Board of Directors of CBS;
Edward Klauber, Executive Vice President and member of the Board of Directors of CBS;
Herbert V. Akerberg, Vice President of CBS;

[fol. 290] II

Description of the Radio Broadcasting Industry

3. That a radio network system consists of two or more stations which broadcast the same program simultaneously, the program being transmitted to the stations comprising the network either from the station originating the program or from some other source over telephone wires usually leased from the American Telephone and Telegraph Company; that stations composing a network are often referred to as "affiliated" with a network and their relations with the network are usually covered by the terms of so-called "affiliation contracts" entered into separately by each of the stations with the network company; that a broadcasting station may be affiliated with more than one network and regardless of that affiliation may carry programs of other networks on a temporary or permanent basis by means of a wire line with such other network; that a network operation may be national or regional in scope; that at the time of the filing of this Complaint there are in operation four national network systems in the United States; that two of said networks are operated by the National Broadcasting Company, hereinafter referred to as NBC, one by the Mutual Broadcasting System, hereinafter referred to as MBS, and one by CBS;

4. That programs transmitted by the networks to their affiliated stations are of two types, namely, "sustaining" or "commercial"; that "sustaining" programs are programs

which are not sponsored or paid for by an advertiser, and include, among others, programs transmitted by the networks as a public service; that "commercial" programs are those which are sponsored and paid for, usually by an advertiser; that a broadcasting station affiliated with a national network is permitted to broadcast all of the network "sustaining" programs; that such station may broadcast a "commercial" program carried by the network only upon the consent of the sponsor or advertiser; that while a station affiliated with a network receives no revenue for broadcasting "sustaining" programs it is required to compensate the network whenever "sustaining" programs are carried where affiliation is with NBC or CBS; that stations affiliated with networks receive compensation only when they carry "commercial" programs;

[fol. 291] 5. That the nature of the radio spectrum is such that the number of broadcasting stations which can operate, the power which they can utilize, the number and character of broadcasting stations available for participation in network broadcasting, and the facilities available for licensing are limited;

6. That an advertiser using the facilities of a nationwide radio network is interested in securing the widest possible circulation and the greatest number of listeners; that the circulation of an individual station participating in a network program depends on its geographic location, the power under which the station is authorized to operate, the frequency assigned to it, and its hours of operation; that the power employed by a broadcasting station determines the strength of its signal and affects the scope of the area it can serve; that the lower the frequency assigned the farther the station's signal will carry and the larger the area served;

7. That there are more than 800 commercial radio broadcasting stations in the United States which are operated under the authority of the Federal Communications Commission (hereinafter referred to as the FCC) pursuant to the Act of Congress known as the Communications Act of 1934, approved June 19, 1934, and prior acts of Congress; that in many cities and towns of the United States there are less than four broadcasting stations having comparable facilities; that in such cities and towns it is impossible for the four existing networks or for potential networks to secure

affiliated station outlets where such available stations are controlled exclusively by existing networks; that 105 cities and towns in the United States, each having a population in excess of 50,000 have three or less full-time commercial stations in each (list attached hereto as Exhibit A and made a part hereof);

8. That radio advertisers in whose behalf commercial radio programs are produced are of three types, namely, national advertisers using national network facilities, national advertisers using electrical transcriptions, and local advertisers sponsoring programs over local stations either through the medium of performance by live talent or through the reproduction of programs recorded upon electrical transcriptions; that a national advertiser may contract for the [fol. 292] use of a station's time either by entering into contractual arrangements with the network with which the station is affiliated or by contracting directly with the several stations affiliated with the network; that the program of the national advertiser, using network facilities, must be produced through the performance of live talent present in the studio of the station originating the network broadcast; that the program of a national advertiser who does not use network facilities is usually produced by the reproduction of programs recorded upon electrical transcriptions; that electrical transcriptions are mechanical devices upon which programs are recorded or mechanically reproduced for the exclusive use of radio broadcasting stations;

III

Position of Defendants in the Radio Broadcasting Industry

9. That CBS has for its key station WABC in the City and State of New York; that CBS is composed of radio stations which comprise the "basic" network and others which are known as "supplemental" affiliations; that the CBS "basic" network is composed of 28 stations, either licensed to or affiliated with CBS; that there are in addition thereto more than 93 stations affiliated with CBS which are supplemental to the CBS "basic" network and are available at the option of the advertiser;

10. That of 52 existing clear channel radio stations in the United States CBS owns, controls or has affiliated with it 18, and NBC 32; that most of the full-time regional sta-

tions are likewise affiliated with either CBS or NBC; that excluding low-powered local stations, more than half of all the stations in the country are affiliated with CBS and NBC; that of the 92 cities in the United States with more than 100,000 population, less than 63 have three or more full-time stations and less than 37 have four or more full-time stations; that there are more than 45 cities in the United States with a population in excess of 50,000 served by CBS or NBC or both, in which no other network can procure an independent full-time broadcasting station outlet because of the control exerted by CBS and NBC; that in over 20 cities of the United States, including Cleveland, Indianapolis, Houston, Birmingham, Providence, Des Moines, Albany, Charlotte and Harrisburg, other networks can pro- [fol. 293] cure only limited access to the existent radio broadcasting facilities;

11. That CBS is the direct operator and licensee, under licenses issued by the FCC, of the following broadcasting stations, having the call letters, power, and locations set out below:

Call Letters	Location	Power
WABC	New York	50,000 Watts
WJSV	Washington	50,000 "
WBT	Charlotte, N. C.	50,000 "
WEEI	Boston	5,000 "
WBBM	Chicago	50,000 "
WCCO	Minneapolis.	50,000 "
KMOX	St. Louis	50,000 "
KNX	Los Angeles	50,000 "

12. That for the years 1938, 1939 and 1940, the net time sales for the entire radio industry were $117,379,456, $129,968,026; and $154,823,787, respectively, as compared with $25,450,351, $30,961,499 and $35,630,063 for CBS; $35,611,145, $37,747,543 and $41,683,341 for NBC; and $2,272,662, $2,610,969 and $3,600,161 for MBS;

13. That the power and dominant position of NBC and CBS are further shown by comparing the net operating income for the entire broadcasting industry with that of NBC and CBS; that for the years 1938, 1939 and 1940, the net operating income for the entire broadcasting industry was $18,854,784, $23,837,944 and $33,296,708 respectively, as com-

pared with $4,329,510, $6,128,686, and $7,431,634 for CBS; and $4,137,503, $4,103,909, and $5,834,772 for NBC;

14. That the relative positions of CBS and NBC in the radio industry are apparent from the fact that in each of the years mentioned CBS and NBC have each enjoyed net profits in excess of the gross revenues of their only competitor in national network operations;

15. That stations affiliated with CBS and NBC have over 85% of the total combined night-time power of all stations in the United States; that by reason of the dominant position in the industry of CBS and NBC and because of the large volume of business controlled by them and the many [fol. 294] advantages afforded radio stations through affiliation with them a network affiliation or a continued network affilation with either CBS or NBC is desired by practically all commercial radio broadcasting stations; that CBS and NBC have exercised the power inherent in their dominant position by imposing upon their respective affiliated broadcasting stations certain identical tying clauses which have prevented such stations from dealing with other competing network systems and have prevented CBS and NBC from dealing with radio stations other than their regular network affiliated stations; that both CBS and NBC have optioned all, or a part, of their respective affiliated stations' time on the air, a substantial portion of which is never used by either network; that NBC, as well as CBS, has entered into contracts of several years' duration with each of its affiliated stations, and is the owner, operator and licensee of radio stations located in lucrative marketing areas;

IV

Jurisdiction and Venue

16. That this Complaint is filed and the jurisdiction of this Court invoked to obtain equitable relief against defendant Columbia Broadcasting System and certain of the officers and members of the Boards of Directors thereof, because of their violations, jointly and severally, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act;

17. That the unlawful combination and conspiracy hereinafter described to restrain commerce among the several states of the United States has been carried on in part within

the Northern District of Illinois, Eastern Division, and many of the unlawful acts pursuant thereto have been performed by defendants and their representatives in said District; that the interstate commerce in radio broadcasting and electrical transcriptions, as hereinafter described, is carried on in part within said District; that said corporate defendant has a usual place of business in said District and there transacts business and is within the jurisdiction of this Court for the purpose of service;

[fol. 295]

Interstate Commerce

a. Radio Broadcasting

18. That radio broadcasting stations, including network broadcasting systems in the United States, are engaged in commerce among the several states of the United States, the District of Columbia, and within the Northern District of Illinois, Eastern Division; that each station is an instrumentality through which energy, ideas and entertainment are transmitted across state or national boundaries to radio listeners in the United States, the District of Columbia, and foreign countries;

b. Electrical Transcriptions

19. That more than 50% of the electrical transcriptions produced in the United States for the exclusive use of radio broadcasting is produced or manufactured in the States of New York and California and shipped to radio broadcasting stations located throughout the United States, the District of Columbia, and within the Northern District of Illinois, Eastern Division; that a substantial portion of the time devoted to radio broadcasting by radio broadcasting stations is consumed by the broadcasting of intelligence, entertainment and information recorded upon electrical transcriptions;

VI

The Combination and Conspiracy

20. That the defendants named herein, together with affiliated broadcasting stations, each well knowing of the matters and things hereinbefore alleged, for many years,

preceding the filing of this Complaint and continuing to the date of the filing hereof, have been engaged in the United States, and within the Northern District of Illinois, Eastern Division, in a wrongful and unlawful combination and conspiracy in restrain of the aforesaid interstate commerce and in a wrongful and unlawful combination and conspiracy to attempt to monopolize the aforesaid interstate commerce in radio broadcasting in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and [fol. 296] Monopolies" (15 U. S. C. A. 1 and 2), and have conspired to do all acts and things and to use all means necessary and appropriate to make said restrains effective, including the means, acts and things hereinafter more particularly alleged;

21. That one of the purposes of the conspiracy was to procure, monopolize and keep within the control of the defendants herein, to the greatest extent possible and to the exclusion of other persons and corporations, the business of conducting national radio network operations and to suppress competition in all phases of such operations, including competition in securing national radio advertisers; that as a part of said combination and conspiracy the defendants have arranged and agreed among themselves to do and have done the following things:

(a) To require radio stations affiliated with CBS to execute affiliation contracts containing clauses which by their terms have forbidden said broadcasting stations from accepting any programs from any other national network (a typical copy of such contract clause is attached hereto, as "Exhibit B" and made a part hereof);

(b) To refuse to furnish CBS network programs to radio stations not regularly affiliated with CBS even though the regularly affiliated station covering substantially the same area is not broadcasting such programs, thereby preventing many radio listeners from hearing and enjoying CBS network programs that would otherwise be available;

(c) To require radio stations affiliated with CBS to execute affiliation contracts containing so-called option time clauses. Those clauses usually provide that upon 28 days' notice the network may exercise the option to use any part of the affiliated stations' time on the air as the network may

desire. Typical option time clauses are attached hereto marked "Exhibits C and D" and made a part hereof;

(d) To suppress competition among radio networks in the sale to advertisers of time on the air by optioning all of the more desirable time of affiliated stations, which options may be exercised upon 28 days' notice. The value of a program to a radio advertiser depends largely on its continuation for such period of time as to familiarize the listening public with the program, the local station over which it is [fol. 297] broadcast, and the time of the broadcast. The necessary effect, therefore, of such option time contracts has been to prevent any other network from competing with CBS in the furnishing of network programs, or in arranging network broadcasts on behalf of network advertisers to such stations during the stations' time on the air optioned to CBS, even though a substantial portion of the affiliated stations' time optioned to CBS has not been purchased by CBS for the broadcasting of commercial programs;

(e) To suppress competition between CBS and its affiliated radio stations in securing commercial radio advertisers through CBS's practice of optioning of its affiliated stations' time on the air, thereby vesting in CBS rather than in the affiliated stations, the power to make satisfactory commitments with radio advertisers as to the desired portion of the station's time on the air;

(f) To prevent affiliated stations from entering into any commitments with local radio sponsors or advertisers for the more desirable hours for periods longer than 28 days, even though CBS does not exercise its option to use such time;

(g) To suppress competition between CBS and electrical transcription manufacturers in securing commercial radio advertisers for stations affiliated with CBS through exercise by CBS of its option on the affiliated stations' time on the air in such manner as to prevent electrical transcription manufacturers or advertisers desiring to use electrical transcriptions for broadcasting purposes from securing satisfactory commitments as to desired radio time and as to geographic distribution directly with the radio stations affiliated with CBS;

(h) To suppress competition with other network systems in securing network station outlets by requiring affiliated

stations to execute long term contracts. The FCC issues licenses for station operation for periods not longer than two years. The affiliation contracts between CBS and its affiliated stations are for periods of five years or more. The stations affiliated with CBS have been forced to sign these long term contracts because of the dominate position in the broadcasting industry enjoyed by CBS, and because NBC, its chief competitor, forces its affiliated stations to sign similar long term contracts.

[fol. 298] (i) To suppress the development of existing and potential radio network systems, by entering into the aforesaid "tying" affiliation contracts with stations located in substantially all of the more lucrative marketing areas where the number of radio broadcasting stations available for network systems is limited, well knowing that their major competitor, NBC, is pursuing a similar policy;

(j) To acquire complete ownership and control of radio stations located in certain cities and towns in which the number of broadcasting stations having comparable radio facilities is insufficient to permit other national network operations to use exclusively the facilities of one of such stations;

VII

Effect of Conspiracy

22. That the defendants have adopted the means and engaged in the activities aforesaid, with the intent, purpose, and effect of unreasonably and unlawfully suppressing competition in the conduct and development of national radio network systems, and have otherwise unreasonably restrained commerce in radio broadcasting and electrical transcriptions; that their activities aforesaid have prevented unknown thousands of radio listeners from hearing and enjoying radio network programs that otherwise would have been available and have affected the quality of radio network programs which could be expected to flow from a competitive radio broadcasting industry;

23. That the radio stations affiliated with defendants in the operation of national networks have substantial investments of money, credits and property in their businesses and said investments and businesses would be greatly reduced in value or destroyed if defendants, because of their

dominant position in the industry, refused to allow such stations to continue a network affiliation;

24. That the power of defendants, the competitive advantages enjoyed by them, the unreasonable restraints of interstate commerce inherent in the ownership and operation of a national network system and of radio stations located in cities and towns in which there are less than four radio stations with comparable facilities are such that they are subject to abuses which can be corrected only by a severance of these ownerships and controls.

[fol. 299]

VIII

Prayer

Wherefore, the complainant prays:

1. That summons issue to each of the defendants, commanding said defendants to appear herein and to answer the allegations contained in this Complaint and to abide by and perform such orders and decrees as the Court may make in the premises;

2. That upon final hearing of this cause, the Court order, adjudge and decree that the conspiracy and wrongs herein described exist and constitute an unreasonable restraint of trade and commerce among the various states and the District of Columbia;

3. That a receiver be appointed to receive forthwith any stock and share capital owned by Columbia Broadcasting System or any officers thereof, which represents the ownership of radio stations located in cities and towns in which there are less than four radio stations with comparable facilities, and that defendants be thereupon ordered forthwith to transfer the aforesaid stock and share capital to the aforesaid receiver; that the aforesaid receiver upon receiving the aforesaid stock and share capital offer such operations for sale and sell the same, holding the proceeds subject to the order of the Court; that in the event there is no stock and share capital of a severable nature representing ownership of the above named radio stations, the Court require defendants to sever their ownership, operation and control of said radio stations and otherwise enjoin the operation of same by defendants in such manner and form as the Court shall deem just and proper;

4. That the defendants and each and all of their respective officers, managers, agents, employees, and all persons acting or claim to act on behalf of defendants be enjoined and restrained from entering into any contract, agreement, conspiracy, or otherwise to do the following acts and things:

(a) To exercise any right or power to prevent affiliated radio stations from accepting any program from any other network during such stations' time on the air which is not being used by defendants;

[fol. 300] (b) To refuse to furnish CBS network programs to radio stations covering substantially the same area as the regularly affiliated stations, in a non-discriminatory manner, when the regularly affiliated station does not broadcast such programs;

(c) To prevent or hinder the affiliated stations from scheduling programs before the defendants finally agree to use the time during which such programs are scheduled, or from requiring the station to clear time already scheduled for use, either through the medium of live talent or electrical transcriptions, when the defendants seek to use the time;

(d) To enter into or assert any contract of affiliation with any radio station for a period longer than two years;

5. That the complainant recover the costs and disbursements of this suit;

6. That the complainant shall have such other and further relief as the Court shall deem just and proper.

Victor O. Waters, Special Assistant to the Attorney General. —— ——, Attorney General. —— ——, Assistant Attorney General. —— ——, United States Attorney.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No.

UNITED STATES OF AMERICA

v.

COLUMBIA BROADCASTING SYSTEM, WILLIAM S. PALEY, EDWARD KLAUBER and HERBERT V. AKERBERG

Affidavit

VICTOR O. WATERS, being duly sworn, says:

I am a Special Assistant to the Attorney General and have been actively engaged in the conduct of the investigation and other work on behalf of the complainant in connec- [fol. 301] tion with this proceeding. I have read the Complaint herein and know the contents thereof and am informed and verily believe the allegations therein to be true. The sources of my information and the grounds of my belief are the statements and correspondence of various officials of radio broadcastinug stations, radio network systems and manufacturers of electrical transcription records; the statements and official reports of Government investigators, records and evidence assembled by the Federal Communications Commission, and correspondence, memoranda, statements and agreements of the defendants.

Victor O. Waters, Special Assistant to the Attorney General.

Subscribed and sworn to before me this — day of —, 19. —— ——, Notary Public, District of Columbia.

EXHIBIT "A" TO COMPLAINT

Summary of Metropolitan Districts in the United States Having a Population in Excess of 50,000, Having Three or Less Full-Time Commercial Stations and Showing the Population and Total Number of Full-Time Commercial Stations in Each

Three full-time commercial stations

Metropolitan District	Population	Total number of full-time commercial stations
Cleveland, O.	1,214,943	3
Milwaukee, Wis.	790,336	3
Houston, Tex.	510,397	3
Rochester, N. Y.	411,970	3
Birmingham, Ala.	407,851	3
Youngstown, O.	372,428	3
Akron, O.	349,705	3
Worcester, Mass.	306,194	3
Omaha-Council Bluffs, Nebr.-Ia.	287,698	3
San Diego, Cal.	256,368	3
Miami, Fla.	250,537	3
Richmond, Va.	245,674	3
Nashville, Tenn.	241,769	3
Salt Lake City, Utah	204,488	3
[fol. 302] Jacksonville, Fla.	195,619	3
Chattanooga, Tenn.	193,215	3
Tulsa, Okla.	188,562	3
Des Moines, Ia.	183,973	3
Duluth-Superior, Minn.-Wis.	157,098	3
Knoxville, Tenn.	151,829	3
Beaumont-Port Arthur, Tex.	138,608	3
Wichita, Kans.	127,308	3
Little Rock, Ark.	126,724	3
Phoenix, Ariz.	121,828	3
Shreveport, La.	112,225	3
Springfield, Mo.	70,514	3

Two full-time commercial stations

Columbus, O.	365,796	2
Toledo, O.	341,663	2
Lowell-Lawrence-Haverhill, Mass.	334,969	2
Allentown-Bethlehem-Easton, Pa.	325,142	2
Norfolk-Portsmouth-Newport News, Va.	323,326	2
Fall River-New Bedford, Mass.	272,648	2
Dayton, O.	271,513	2
Bridgeport, Conn.	216,621	2
Grand Rapids, Mich.	209,873	2
Wheeling, W. Va.	196,340	2

Metropolitan District	Population	Total number of full-time commercial stations
Wilmington, Del.	188,974	2
Davenport-Rock Island-Moline, Ia.-Ill.	174,995	2
Harrisburg, Pa.	173,367	2
Huntington-Ashland, W. Va.-Ky.	170,979	2
Sacramento, Cal.	158,999	2
Waterbury, Conn.	144,822	2
Evansville, Ind.	141,614	2
Charleston, W. Va.	136,332	2
Fort Wayne, Ind.	134,385	2
Erie, Pa.	134,039	2
Savannah, Ga.	117,970	2
El Paso, Tex.	115,801	2
Mobile, Ala.	114,906	2
Charlotte, N. C.	112,986	2
Roanoke, Va.	110,593	2
[fol. 303] Winston-Salem, N. C.	109,833	2
Portland, Me.	106,566	2
Atlantic City, N. J.	100,096	2
Charleston, S. C.	98,711	2
Fresno, Cal.	97,504	2
Montgomery, Ala.	93,697	2
Columbia, S. C.	89,555	2
Springfield, Ill.	89,484	2
Lincoln, Nebr.	88,191	2
Jackson, Miss.	88,003	2
Augusta, Ga.	87,809	2
Sioux City, Ia.	87,791	2
Manchester, N. H.	81,932	2
Asheville, N. C.	76,324	2
Macon, Ga.	74,830	2
Corpus Christi, Tex.	70,677	2
Amarillo, Tex.	53,463	2

One full-time commercial station

New Haven, Conn.	308,228	1
Canton, O.	200,352	1
Trenton, N. J.	200,128	1
Utica-Rome, N. Y.	197,128	1
Flint, Mich.	188,554	1
Reading, Pa.	175,355	1

Metropolitan District	Population	Total number of full-time commercial stations
Peoria, Ill.	162,566	1
Saginaw-Bay City, Mich.	153,388	1
Johnstown, Pa.	151,781	1
South Bend, Ind.	147,022	1
Binghamton, N. Y.	145,156	1
Racine-Kenosha, Wis.	135,075	1
Lancaster, Pa.	132,037	1
San Jose, Cal.	129,367	1
Altoona, Pa.	114,094	1
Lansing, Mich.	110,356	1
Austin, Tex.	106,193	1
Rockford, Ill.	105,259	1
York, Pa.	92,627	1
Columbus, Ga.	92,478	1
[fol. 304] St. Joseph, Mo.	86,991	1
Berkeley, Cal.	85,547	1
Terre Haute, Ind.	83,370	1
Stockton, Cal.	79,337	1
Madison, Wis.	78,349	1
Topeka, Kans.	77,749	1
Springfield, O.	77,406	1
Kalamazoo, Mich.	77,213	1
Cedar Rapids, Ia.	73,219	1
Greensboro, N. C.	73,055	1
Galveston, Tex.	71,677	1
Waco, Tex.	71,114	1
Durham, N. C.	69,683	1
Decatur, Ill.	65,764	1
Pueblo, Colo.	62,039	1
No full-time commercial stations		
Hamilton-Middletown, O.	112,6[illegible]6	0
Waterloo, Ia.	67,050	0

Exhibit "B" to Complaint

Typical Exclusive Clause Preventing Station From Using Other Networks

"It is agreed that during the term of this contract the station will not, without the specific consent in writing of

Columbia, permit the use of its facilities by any other broadcasting chain or network; that without such consent it will not receive programs from or forward programs to any other station, group of stations, chain, or network; and that without such consent it will not, directly or indirectly, through an agency, representative, or otherwise, sell its facilities for use along with the facilities of any other station or stations as a group."

[fol. 305] EXHIBITS "C" AND "D" TO COMPLAINT

Typical Option Time Clauses of CBS

"The Station agrees to furnish the facilities of its station to Columbia for all commercial programs and undertakes to accept and broadcast all such commercial programs offered to it by Columbia, at whatever day or hour, during the time when the Station is licensed to operate."

"The Station will broadcast all network sponsored programs furnished to it by Columbia during the time when the Station is licensed to operate; provided, however, that except in connection with occasional sponsored programs of special events (such as World Series broadcasts) during periods of not more than two weeks each, the Station need not in any week broadcast network sponsored programs totaling more than fifty 'converted hours' (as defined below, but for this purpose computed during the entire term of this agreement on the basis of the difference in rates at different hours specified in Columbia's Rate Card No. 23."( )

( ) A "converted hour" is defined in the contract as follows:

"A 'converted hour' means an aggregate period of one hour during which there shall be broadcast over the Station one or more network sponsored programs for which Columbia shall charge its full night-time card rate for the station. An aggregate period of one hour during which there shall be broadcast over the Station one or more network sponsored programs for which Columbia shall charge a fraction of its night-time card rate, such as its daytime card rate, shall be the equivalent of the same fraction of a 'converted hour.' Fractions of an hour shall for all purposes be treated as their fractional proportions of full hours at the same time of the day."

[fol. 306] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HERBERT V. AKERBERG

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

HERBERT V. AKERBERG, being duly sworn, deposes and says:

1. I am a Vice-President of Columbia Broadcasting System, Inc. (hereinafter called "Columbia") in charge of station relations, and have been employed in this capacity since 1936. From 1933 to 1936 I was General Manager of this department and my duties were substantially what they are now. I have been employed by Columbia since 1929. I have heretofore made an affidavit in support of Columbia's Motion for Preliminary Injunction herein, said affidavit having been verified October 29, 1941.

2. The payments by Columbia to its affiliated stations (excluding stations owned or leased by Columbia) as compensation for the broadcasting of network commercial programs during the accounting years 1931 through 1940 and during the first 10 months of 1941 have represented, with the exception of the year 1938, ever-increasing percentages of the amounts received by Columbia from advertisers and advertising agencies (after deducting applicable discounts and agency commission) for the broadcasting of network commercial programs over such stations. The trend of the percentage of the amounts so received by Columbia paid to affiliated stations is shown in the table below in which the percentage for 1931 is expressed as 100:

1931	100
1932	127
1933	142
1934	171
1935	185
1936	192
1937	197
1938	181
1939	201
1940	211
1941 (10 months)	222

[fol. 307] The foregoing index figures have been computed without giving effect to payments made by some stations to the network on account of the expense of connecting the station to the network. As these payments were greater, both in the aggregate and proportionately, in 1931 than in 1940 or 1941, adjustment of the figures above to reflect deduction of such wire cost from the amount of station compensation would result in showing an even sharper rate of increase in the stations' share of network revenues.

3. As of the date of this affidavit, 113 stations (exclusive of the eight operated by Columbia) are affiliated with the Columbia network. Contracts with 106 of such stations provide for a term (either in the original contract or a subsequent modification) in excess of two years. As used in this affidavit the "term" of an affiliation agreement means the original term of such agreement (whether or not such term may be shortened, or might have been shortened, by Columbia by exercise of a right of cancellation) plus the aggregate of all renewal periods, if any, by which the term of the contract may be extended, or might have been extended, at the option of Columbia.

4. The provision of the form of contract set forth in Exhibit A to the complaint, giving Columbia an option to terminate on twelve months' notice, has been omitted from the contracts for 44 of the 106 stations whose contracts provide for a term in excess of two years. With three exceptions noted below, the contracts for such 44 stations give no right of cancellation by Columbia, other than the usual right specified in the contracts to cancel on 60 days' notice if, as a result of a change in the power, frequency, time or manner of operation of the station, the value of the station as an outlet for Columbia network programs is substantially lessened. The contracts for such 44 stations contain no provision giving Columbia an option to extend the original term of such contracts.

One of such contracts provides that Columbia may terminate if station WABC operates with 500,000 watts. Another provides that Columbia may terminate if Columbia has an opportunity to affiliate with a 50,000 watt station in the area served by the station to which the contract refers. A third contract provides that Columbia may terminate if Columbia has an opportunity to affiliate with a 50,000 watt station is a designated area; such right of cancellation may

[fol. 308] not be exercised, however, if the station to which the contract refers is itself licensed to operate and is operating with 50,000 watts within a designated time.

Of the contracts for the 44 stations above referred to from which the provision for termination on twelve months' notice has been omitted, those for 26 stations are for a term of five years or more and were made for the five year, or longer, term at the specific request of the respective stations. Nine of such stations requested a five year or longer affiliation contract because they had an opportunity to increase their power or improve their plants, or both, and were unwilling to make the large capital expenditure involved without assurance that they would receive Columbia network sustaining and commercial programs for a period of years. Seventeen of such stations requested the five year or longer affiliation contract because they believed that the assurance that they would receive Columbia network sustaining and commercial programs for a period of years would contribute to stability of station operations. The contract for one of these stations which is for a term in excess of five years, but which may be terminated by Columbia in the event that the station is not operating with 50,000 watts on the frequency specified in the contract within the time limit specified by Columbia, becomes non-cancellable when the station is so operating and was made for the long term at the request of the station so that it would be assured of Columbia network sustaining and commercial programs for a period of years in the event that the station is able to begin operating with 50,000 watts during the specified time limit.

5. One of the purposes of my prior affidavit above referred to was to show that because of the order complained of Columbia has received letters from numerous of its affiliates (copies of many of which are annexed to said affidavit as exhibits) cancelling or repudiating, or threatening to cancel or to refuse to perform, their affiliation contracts.

On October 31, 1941, William S. Paley, President of Columbia, sent to each Columbia affiliate a wire, a copy of which is annexed hereto as Exhibit A, informing affiliates that on the day before Columbia had filed a bill in equity in the Federal Court seeking to enjoin the Federal Communications Commission from putting into effect the regulations promulgated by the order complained of. On Octo-

[fol. 309] ber 31, 1941, the Commission issued its so-called "Minute" (a copy of which is Appendix D to Government's brief) which purported to assure affiliates that if they wished to contest the validity of the regulations in proceedings before the Commission they would be allowed to remain on the air pending the proceedings and any appeal. On November 6, 1941 Edward Klauber, Executive Vice President of Columbia, sent to each Columbia affiliate a letter, a copy of which is annexed hereto as Exhibit B, together with a copy of a public statement made by Columbia, a copy of the complaint, and a copy of the affidavit of Mr. Paley herein, sworn to October 30, 1941. The public statement stated, among other things, that Columbia had moved in the Federal Court to prevent the Federal Communications Commission from putting its new regulations into effect on November 15th and that "The relief sought by Columbia is a court order which would suspend the new rules pending a trial of the issues before a three-judge statutory court". On November 12, 1941 I sent to each Columbia affiliate a telegram, a copy of which is annexed hereto as Exhibit C, informing affiliates that by court order in conformity with a stipulation between counsel the regulations had been suspended in their entirety until after the hearing and decision of Columbia's motion.

Since the issue on October 31, 1941 of the Commission's Minute referred to above, Columbia has continued to receive indications that its affiliates would cancel, repudiate or refuse to perform their affiliation contracts and refuse to renew such contracts, and Columbia has received no indication that the Minute has had or will have the effect of inducing stations to assume the burden of themselves testing the validity of the regulations in hearings before the Commission and subsequent appeals. In fact, since the issue of the Minute Columbia has received from five affiliates letters cancelling or repudiating affiliation contracts or indicating an intention not to continue to be bound thereby. Copies of these letters are annexed hereto as Exhibits D, E, F, G and H. I believe that Columbia would have received more letters of this sort since October 31, 1941 had it not been for the circulation by Columbia, in the telegrams and letter referred to above, of information of the pendency of Columbia's suit and motion for preliminary injunction, and the stipulation and order suspending the regulations pending hearing and decision thereon.

[fol. 310] After the making of the order of November 12, 1941, Columbia resumed the negotiations with stations for renewal of their affiliation contracts, which negotiations had been terminated as a result of the Commission's regulations as stated at pages 3 and 4 of my affidavit of October 29, 1941, and renewals of several of such contracts have been obtained on substantially the same terms as provided in the old contracts.

Herbert V. Akerberg.

Subscribed and sworn to before me this 5th day of January, 1942. George A. Burwell, Notary Public. N. Y. Co. Clk's No. 527, Reg. No. 3B800; Kings Co. Clk's No. 119, Reg. No. 3459; Bronx Co. Clk's No. 62, Reg. No. 248B43; Queens Co. Clk's No. 2167, Reg. No. 8330; Certificates filed in Westchester and Richmond Counties. Commission expires March 30, 1943. (Seal.)

Exhibit "A" to Affidavit of Herbert V. Akerberg

October 31, 1941.

To the affiliates of the Columbia Broadcasting System, Inc.:

Yesterday, Columbia in a bill of Equity filed in the Federal Court, asked that the Federal Communications Commission be enjoined from putting into effect the new chain broadcasting rules. Columbia stated that the action of the Commission was arbitrary and without any basis in law, and would be destructive to the American broadcasting industry.

Columbia has insisted ever since the rules were first promulgated, that the exercise of vague and ill-defined powers by the Commission would have a very intimidating effect on the industry, and that such powers would act as a direct threat to freedom of the air.

Columbia will prosecute the suit vigorously and, at the same time, continue its efforts for the enactment of a new radio law which will recognize the present status of the radio art and the important part networks now play in American broadcasting; also a law which will clearly spec- [fol. 311] ify the powers of the Commission and thus safeguard the interests of broadcasters and the public alike.

We feel that this court proceeding is not only for Columbia's best interests, but also for the protection of every broadcaster in America and the great listening public.

We will keep you informed of further developments.

William S. Paley.

Exhibit "B" to Affidavit of Herbert V. Akerberg

Columbia Broadcasting System, Inc.

485 Madison Avenue

New York

Office of The Executive Vice President, Edward Klauber

November 6, 1941.

Supplementing Mr. Paley's telegram to you of October 31, I am sending you herewith a copy of the public statement made by us when we went into the Federal Court in an effort to enjoin the FCC from enforcing its regulations and for your fuller information, a copy of our complaint and of an affidavit by Mr. Paley filed therewith.

Sincerely yours, Edward Klauber.

Exhibit "C" to Affidavit of Herbert V. Akerberg

Copy

Columbia Broadcasting System, Inc.

Private Wire

Date November 12, 1941.

To Affiliated Stations:

The United States District Court in New York today ordered, in conformity with a stipulation between counsel for the FCC and ourselves, that the Chain Broadcasting Order [fol. 312] and Regulations be suspended in their entirety until after the hearing and decision on our motion for an injunction. The hearing date for this motion and on motions made by FCC counsel has been postponed until De-

cember fifteenth. We are happy to report this development to you in line with our promise to keep you advised.

Herb. Akerberg.

EXHIBIT "D" TO AFFIDAVIT OF HERBERT V. AKERBERG

Illinois Broadcasting Corporation

Quincy, Illinois

November 7, 1941.

Columbia Broadcasting System, Inc., 485 Madison Avenue, New York City, New York.

GENTLEMEN:

The Illinois Broadcasting Corporation, owner and operator of Radio Station WTAD, at Quincy, Illinois, has at all times complied with the rules and regulations of the Federal Communications Commission and desires and expects to continue to do so.

You are hereby notified that the contract entered into on November 15, 1940 by and between Columbia Broadcasting System, Inc. and Illinois Broadcasting Corporation insofar as said contract is in conflict with or fails to comply with the orders, rules and regulations of the Federal Communications Commission effective as of date November 15, 1941, or insofar as said contract fails to comply fully with said orders, rules and regulations of the said Federal Communications Commission is hereby declared abrogated and null and void. This action on the part of Illinois Broadcasting Corporation is made for the purpose of complying with the orders, rules and regulations of the Federal Communications Commission and is in accord with the terms and provisions of Paragraph 9 of said contract with you of date November 15, 1940, the provisions of said Paragraph 9 being as follows:

"The obligations under this agreement are subject to all applicable laws, rules and regulations, present and future, [fol. 313] especially including rules and regulations of the Federal Communications Commission."

Respectfully, Illinois Broadcasting Corporation, (Sgd.) by Emery Lancaster, President. Studios W. C. U. Building.

EXHIBIT "E" TO AFFIDAVIT OF HERBERT V. AKERBERG

WLAW

Columbia's Voice In Northern New England

Operated By Hildreth & Rogers Co.

Studios: 278 Essex Street

Lawrence, Massachusetts

November 8, 1941

Herbert V. Akerberg, Vice Pres., Columbia Broadcasting System, Inc., 485 Madison Avenue, New York, N. Y.

DEAR MR. AKERBERG:

In view of the new rules and regulations recently issued by the Federal Communications Commission and confirmed by their order, we would like to arrange a conference at your earliest convenience between your organization and ourselves, in order to adjust our contractual relationship to comply with the above.

It is our understanding that this should be completed before November 15th.

Very truly yours, A. H. Rogers (sgd.), Pres. & Treas.

AHR/h

[fol. 314] EXHIBIT "F" TO AFFIDAVIT OF HERBERT V. AKERBERG

Radio Station WBAB

Owned and Operated By The Press-Union Publishing Co.

Atlantic City, New Jersey

November 13, 1941.

Mr. Edward Klauber, Vice-President, Columbia Broadcasting System, 485 Madison Avenue, New York, N. Y.

Re: F. C. C.'s Chain Monopoly Regulations

To Become Effective November 15, 1941

DEAR MR. KLAUBER:

We purposely delayed writing you regarding the Federal Communications Commission's so-called chain-monopoly

regulations, scheduled to become effective November 15th (and how these regulations will affect our contract with the Columbia Broadcasting System) in the hope that the matter would be amicably adjusted between the Commission and the networks, or that the matter would perhaps be delayed by the courts, temporarily at least, to give the networks and their affiliates an opportunity to gradually adjust their operations to comply with the new regulations.

We note that you have applied to the courts for an injunction but nothing having developed up to the present moment, we find it necessary, very much to our regret, to request that you arrange to submit to us a new contract, covering a period of not longer than two years and to be worded in accordance with the new regulations.

As you know, Section 9 of our present contract sets forth that all of our agreements with you are subject to the rules and regulations of the Federal Communications Commission which would, it seems to us, automatically take care of the situation created by the new F. C. C.'s new chain monopoly regulations. However, the contract is for a five-year period, with three years still to run from January 23rd, 1942. We regret very much the necessity for making this request, but it is a situation over which we have no control and we sincerely trust that something may develop to adjust this [fol. 315] situation before the new rules and regulations are scheduled to become effective.

Very truly yours, Press-Union Publishing Company, Owners and Operators of Station WBAB. Albert J. Feyl (sgd) President.

AJF:H.

EXHIBIT "G" TO AFFIDAVIT OF HERBERT V. AKERBERG

KLRD, Dallas.
50,000 Watts, 1080 Kilocycles.

The Times Hear-ld Station—Columbia Broadcasting System

Office and Studios, Adolphus Hotel, Dallas

November 19, 1941.

Columbia Broadcasting Company, New York City

GENTLEMEN:

It is our understanding that The Federal Communications Commission issued on May 2, 1941, regulations relat-

ing to contracts between standard broadcast stations and network organizations, which regulations were amended October 11, 1941, and were made effective November 15, 1941. We understand that some temporary order or stipulation has been entered delaying the enforcement of the regulations pending a hearing upon various petitions for preliminary inju-ctions. We do not know just what the effect of such order or stipulation may be or how long it will remain in force, but assume that you are fully advised and will know whether or not and to what extent such order affects the situation. At all events, we feel that we must notify you that if and when the regulations become effective the existing contract between Columbia Broadcasting Company and KRLD Radio Corporation will be considered by us as subject to all valid regulations of the Commission.

Very truly yours, KRLD Radio Corporation, by Albert A. Swinsky, Jr. (Sgd.)

[fol. 316] EXHIBIT "H" TO AFFIDAVIT OF HERBERT V. AKERBERG

KOMA, Oklahoma City's CBS Station.

Owned and Operated by Koma Incorporated

Biltmore Hotel, Phone 2-3291

December 20, 1941.

Registered Mail

Mr. Herbert V. Ackerberg, Columbia Broadcasting System, Inc., 485 Madison Avenue, New York, New York.

DEAR SIR:

This is to notify you that in view of Paragraph 9 in our agreement with the Columbia Broadcasting System, Inc., which provides that the contract shall be subject to all applicable rules and regulation, present and future, of the Federal Communications Commission, we construe our contractual relations with Columbia to have been modified so as to comply with the new network rules of the Commission to the extent that said contract may be inconsistent, or in conflict, with the provisions of said Rules.

Yours very truly, Bryan Mathes (Sgd.) Secretary-Treasurer.

Bryan Mathes/j.

In United States District Court Southern District of New York

[Title omitted]

Affidavit of Frank Stanton

United States of America,
Southern District of New York
City, County and State of New York, ss:

Frank Stanton, being duly sworn, deposes and says:

I am the Director of Research of Columbia Broadcasting System, Inc. (hereinafter sometimes called "CBS" or "Columbia") and I have been its Director of Research since November, 1938. I am also a member of the Advisory [fol. 317] Board of the Office of Radio Research of Columbia University and a Consultant to the Office of Facts and Figures, Washington, D. C. I am fully familiar with the records of the operations of Columbia and with records and statistical material and methods relating to the scientific measurement of program preferences of listeners and habits of radio listening. During the period, 1937-1940, I was Associate Director of the Office of Radio Research, Princeton University. Prior to joining CBS in 1935 I was a member of the faculty of Ohio State University for four years. As partial fulfillment of the requirements for my Ph.D. degree, in the field of industrial psychology, I conducted original research in the field of radio listening habits through the first use of electrical recorders which measured actual radio receiver operation automatically.

This affidavit relates to:

A. Broadcasting of network sustaining programs by Columbia network stations.

B. Public dependence upon radio as a news source.

The analyses hereinafter described under Division A were conducted by my department in CBS and under my supervision. As to Division B, I am well acquainted with the research organizations and individuals, and am familiar with the research procedures and the particular research projects referred to. Such research procedures are generally recognized and accepted by the radio industry as gauges of listener habits or preferences.

A. Broadcasting of Network Sustaining Programs by Columbia Network Stations

1. Available CBS Network Sustaining Programs Broadcast by CBS Network Stations.

The CBS network stations broadcast the majority of the CBS sustaining programs available to them. From among those available they select those which fit their own time schedules and their own program needs. Obviously, the volume of such programs offered by Columbia must be much larger than if the needs of all stations were identical at all times.

An analysis of the sustaining program acceptance reports by CBS network stations for four typical weeks in 1941 [fol. 318] shows the following average percentages of use of all available network sustaining programs by the network stations:

Week of	Percent of Available Network Sustaining Programs which were broadcast
February 2-8, 1941	57.1%
May 4-10, 1941	56.4
August 3-9, 1941	60.0
November 2-8, 1941	52.9
Average	56.7% [1]

Many of the network sustaining programs are made available to groups of network stations, rather than to all stations on the network. This is due, primarily, to two factors: first, the time differentials between different sections of the country which result in the offering of network sustaining programs to stations in one section when stations in another section are not in operation; and second, the fact that network sustaining programs are offered to stations in geographical groups at the same time that network commercial programs are being carried by stations in other geographical groups. The latter practice is followed in order to provide insofar as practicable with present program transmission facilities, each network station with a substantial volume of network service each day. There are deviate cases where,

[1] Stations on the CBS Network broadcast an average of slightly less than five hours a day of network sustaining programs during the above four typical weeks.

because certain program transmission lines are occupied with the transmission of network commercial programs, it is impracticable to supply other stations joined to the network by those lines with sustaining programs when they are not scheduled to receive the network commercial programs.

2. Broadcasting of Available CBS Network News and Cultural Sustaining Programs.

The CBS network sustaining programs in the four typical weeks in 1941 referred to before (*i.e.*, the weeks of February 2-8, May 4-10, August 3-9 and November 2-8) have been further analyzed to segregate the network sustaining programs devoted to news and news analysis and the programs [fol. 319] of cultural appeal. The average percentage of available network sustaining programs in each category which were broadcast by the stations is as follows:

Week of	Percent of Available Network Sustaining *News Programs* Which Were Broadcast	Percent of Available Network Sustaining *Cultural Programs* Which Were Broadcast
February 2-8, 1941	74.5%	65.5%
May 4-10, 1941	71.8	58.6
August 3-9, 1941	71.5	66.1
November 2-8, 1941	67.0	61.9
Average	71.0%	63.2%

The above percentages for news (71.0%) and cultural programs (63.2%) are higher than the average availability-acceptance ratio for all CBS sustaining programs (56.7%).

Not only is the time for many of these programs, which otherwise might be sold for commercial programs, set aside and withheld from sale by CBS, but the expense of preparation and talent is borne entirely by Columbia.

Included in CBS sustaining cultural programs are broadcasts of the New York Philharmonic-Symphony Orchestra, the Indianapolis Symphony Orchestra, the Cincinnati Conservatory of Music, the Columbia Concert Orchestra, and the Salt Lake Tabernacle Choir. Others include "Church of the Air", "Columbia Workshop", "The School of the Air of the Americas", "Invitation to Learning", "Of Men and Books", "The People's Platform", "Young Americans in the Making", and "Let's Pretend".

3. Broadcasting of CBS Network Sustaining Programs of Special Events.

Attached hereto as Exhibit A is a list of thirty outstanding special events programs broadcast as sustaining features of the Columbia network during 1941. During this 12 month period, Columbia's scheduling of special events programs reflected the overshadowing importance of national and international events and the rapidly expanding interest of listeners in these developments. The thirty special events broadcasts listed in Exhibit A were accepted and broadcast by an average CBS network of 106 stations [fol. 320] or 88% of all the stations on the network.[2] This compares with the average of 56.7% acceptance and broadcast of available sustaining programs of all types, referred to above.

B. Public Dependence on Radio as a News Source

1. Reliance of the Public on Newspapers and Radio for News.

The usefulness of radio in the dissemination of news is reflected primarily by the extent to which people *depend* upon the radio for the news. A survey made by Elmo Roper for Fortune Magazine in 1938[3] in which this question was

[2] No adjustment has been made in computing the percentage figure because of time differentials and licensed operating schedules of certain stations or other factors which may have made it impossible for any station to broadcast any of these programs.

[3] Elmo Roper, 30 Rockefeller Plaza, New York City.

Elmo Roper, along with Dr. George Gallup, is one of the pioneers in the scientific sampling and measurement of public opinion. In addition to conducting the Fortune surveys of public opinion, which reported the most accurate of all national pre-election forecasts in 1936 and 1940, Roper maintains a nationwide field force to handle specific studies of media circulation, advertising effectiveness, public attitudes and special management problems.

The Fortune polls, from which data in this affidavit are quoted, are based on personal interviews with a representative cross-section of 3,500-5,000 individuals distributed throughout the United States according to the principles of scientific sampling. Each geographic section, income group, age group, sex group and education group receives the proper proportion of interviews based on the total U. S. population characteristics. In other words, each of Roper's nationwide samples is a minature of the total U. S. population.

asked, "From which one source do you get most of your daily news—the newspapers or radio news broadcasts?", disclosed that 45.2% of the people obtained their news from newspapers, and 23.5% from radio.

A similar study—involving the same technique, the same question and the same research organization—made three [fol. 321] years later in 1941 disclosed an increasing dependence by the public upon the radio for news. Whereas the percentage that relied primarily upon newspapers dropped from 45.2% to 31.2%, the percentage of those who obtained news from radio rose from 23.5% to 39.4%.

The results of the later study showed the following trends by socio-economic groups.

	U. S. Average	Prosperous	Upper Middle	Lower Middle	Poor
Radio	39.4%	30.2%	33.3%	40.8%	45.4%
Newspapers	31.2	36.3	33.0	31.0	27.8
Both	26.2	33.2	33.0	25.9	22.0

It is significant that in the two lower socio-economic groups, involving approximately two-thirds of the population, there is substantially greater dependence on the radio as a source of daily news.

An explanation of the increased dependence on radio as a source of news is to be found in the answers to auxiliary questions asked in the same studies by Elmo Roper. First, those persons who said they got most of their daily news from radio were asked, "Why do you prefer the radio?". The replies were as follows:

Get news more quickly	28.4%
Takes less time to find out what is going on	19.5
More interesting and entertaining	11.9
Just don't read newspapers	7.6
Radio fairer than newspapers	6.9
Radio more complete than newspapers	6.6
Newspapers more confusing	4.3
No mistakes on radio	3.3
Work and listen at same time	2.8
Easier	1.6
Cheaper	1.2

Second, in answer to the question, "Which of the two—radio or newspapers—gives you the news more quickly?", the replies were:

Radio	83.0%
Newspapers	12.9

[fol. 322] Third, in answer to the question: "Which of the two—radio or newspapers—gives you news freer from prejudice?", the replies were:

Radio	49.7%
Newspapers	17.1

Thus, speed and reliability are two factors responsible for the public's high appraisal of radio as a news source.

Radio's reputation as a reliable news source was even more sharply revealed in the Fortune study of 1938 when this question was asked:

"If you heard conflicting versions of the same story from these sources, which would you be most likely to believe?"

The answers showed the following results:

A radio press bulletin	22.7%	40.3%	(Radio)
A radio commentator	17.6		
An authority you heard speak	13.0		
An editorial in a newspaper	12.4	26.9	(Press)
A news item in a newspaper	11.1		
A columnist in a newspaper	3.4		
Depends on paper, writer, speaker	11.6		
Don't know	8.2		

On the basis of this report, radio has a 50% higher factor of credibility in the public mind than newspapers.

2. Radio News and the Lower Income Groups.

The 1941 Roper study previously referred to shows the increased dependence on radio as a news source by those in the lower income groups as compared with those in the higher income groups.

Supporting evidence of this trend is found in a study made by the Office of Radio Research of Princeton Uni-

versity[4] in 1939. The object of the study was to determine [fol. 323] whether radio's usefulness to the public varied with the economic status of the listeners. In personal interviews, a representative sample of 5,528 persons were asked "What is your regular source of news? If more than one, which do you prefer?" The answers disclosed that, in the upper income group only 4.9% depended upon radio alone as a source of news and 38.4% preferred radio to newspapers, while in the middle income group the percentage of those who used radio as an exclusive news source was 7.8%, and of those who preferred radio to newspapers was 50.9%. In the lower income group, however, it was found that 15.0% depended *exclusively* upon radio for news, and 55.6% preferred radio to newspapers.

3. Urban and Rural Dependence on Radio News.

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[4] Office of Radio Research

This office is now at Columbia University, being the continuation of a radio research project begun at Princeton University in the Fall of 1937 and is supported by a grant from the Rockefeller Foundation. The objective of the office is to develop methods of listener research which will contribute to an understanding of the role played by radio for different groups of listeners in the United States.

Several outstanding contributions, both in techniques and analysis, have come from this non-profit research enterprise in the field of communications. The work of the office has included several major studies and numerous minor ones which have been reported from time to time in the scientific journals and more recently in book form ("Radio and the Printed Page" by Paul F. Lazarsfeld, "Radio Research 1941" edited by Paul F. Lazarsfeld and Frank Stanton).

The Office of Radio Research is under the full-time direction of Dr. Paul F. Lazarsfeld, who has an Advisory Board composed of the following members: Dr. Robert S. Lynd, Chairman, Professor of Sociology, Columbia University, Dr. Lyman Bryson, Professor of Education, Teachers College, Columbia University, Dr. Herbert Brucker, Professor of Journalism, Columbia University, Dr. Frank Stanton, Director of Research, Columbia Broadcasting System and Dr. Samuel A. Stouffer, Professor of Sociology, University of Chicago.

The Princeton University study recorded also the preference of urban and rural dwellers for radio as a source of news. In cities over 100,000, radio was preferred by 45.6% as a source of news, whereas in rural areas (farms and towns of 2,500 or less), 55.8% preferred to learn the news by radio.

[fol. 324] Further evidence of the interest of the rural population of America in radio news was reflected in a study made in 1941 by Dr. H. B. Summers [5] in the state of Kansas where the population is predominantly rural. Seven thousand representative listeners were interviewed and asked to select, from a list of 16 general types of programs, the five types which he or she liked best. The table below summarizes the answers to these questions presenting the figures separately for urban and rural (farms and towns of 2,500 or less) listeners;

	Urban	Rural
News broadcasts	72.4%	79.6%
Comedians	63.6	57.2
Audience participation	51.8	48.9
Popular music	47.7	32.7
Variety shows	40.0	34.6

[5] Dr. H. B. Summers, Kansas State College, Manhattan, Kansas

Dr. H. B. Summers at the present time is acting director of the Public Service Division of the National Broadcasting Company. Before this, Dr. Summers was Chairman of the Department of Speech and Radio at Kansas State College, Manhattan, Kansas. While at the university Dr. Summers conducted annual studies of radio listening in the States of Kansas and Iowa each spring beginning at 1937. These studies represented the first published statewide investigations of habits and preferences of radio listeners.

The studies, conducted by trained investigators by means of personal interviews, have followed the same general pattern each year. Approximately 7,000 interviews were made annually with representative families throughout the state distributed in proportion to population.

The questions asked in these annual studies concerned ownership of radios, station listening habits, audience availabilities, preferences for specific programs and preferences for general program types.

	Urban	Rural
Oldtime music	20.6	34.7
Sports broadcasts	23.3	17.1
Complete drama	33.3	27.8
Market reports	5.6	30.9
Religious music	26.6	31.2
Serial drama	30.2	32.3
Band music	19.9	19.0
Talks, comment	18.4	14.2
Classical music	24.7	11.0
Devotionals	13.7	16.8
Talks on farming	4.0	11.4

[fol. 325] In the 1941 study by Elmo Roper, previously referred to, the responses of rural and urban dwellers to the question, "From which one source do you get most of your daily news—the newspapers or radio news broadcasts?", were analyzed, and the results are shown in the following table:

	Urban	Rural
Radio	36.6%	43.0%
Newspapers	34.2	27.3
Both	26.9	25.2

These three studies not only confirm the importance of radio as a source of news, but demonstrate that among rural listeners, as distinct from urban listeners, the margin of the preference for radio is significantly wider.

4. The Elmer Davis Audience.

The over-all popularity of news broadcasts is demonstrated by the size of the audiences who listen to a specific CBS news program. Every two weeks for the past two years Samuel E. Gill[6] has been measuring the audiences of

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[6] Samuel E. Gill, 52 Vanderbilt Ave., New York City.

Mr. Gill conducts an independent research service specializing in the measurement of media circulation, advertising effectiveness and public opinion.

Because the two standard program rating services do not make a practice of rating five-minute programs as a part of their regular services CBS commissioner Mr. Gill to set up a countrywide plan for checking the Elmer Davis news audience regularly.

[fol. 326] "Elmer Davis and The News", a five-minute, seven-times-a-week CBS program. On the basis of the Gill studies it is estimated that currently 15,000,000 people listen to Elmer Davis on the average night.

It is also estimated that a total of 30,000,000 *different* people hear the program during the average week. This accumulated audience is explained by the fact that whereas approximately the same number hear Elmer Davis each of the seven nights, the same people do not hear him every night. Some listeners drop out, others are added, so that during a week's broadcast the total number of different people who hear him at least once is far greater than the audience of a single broadcast.

Frank Stanton.

Subscribed and sworn to before me this 5th day of January, 1942. George A. Burwell, Notary Public. N. Y. Co. Clk's No. 527, Reg. No. 3B800. Kings Co. Clk's No. 119, Reg. No. 3459. Bronx Co. Clk's No. 62, Reg. No. 248B43. Queens Co. Clk's No. 2167, Reg. No. 8330. Certificates filed in Westchester and Richmond Counties. Commission Expires March 30, 1943. (Seal.)

The method adopted for surveying the Elmer Davis audiences is known as the "immediate recall" plan. Representative telephone families are contacted for 15 minutes immediately following the close of the Davis broadcast. Each person answering the telephone is asked questions which elicit information whether he or she listened to the Davis broadcast.

The Elmer Davis audience is checked by Gill in 20 representative cities the first and third weeks of each month. A minimum quota of 4,800 telephone interviews is made during each 7-day period.

These special bi-weekly measurements of the Elmer Davis audience were begun in the Spring of 1940 and have continued through to the present time.

(Here follow 2 photolithographs, side folios 327-328)

[fol. 327]

EXHIBIT "A" TO AFFIDAVIT OF FRANK STANTON

Outstanding CBS Special Events Programs Broadcast During 1941

Day and Date	Program	Time
Mon., Jan. 6	President Roosevelt's Message to Congress	2:00- 2:45 PM
Mon., Jan. 20	President Roosevelt's Third Inaugural Ceremonies: The Nation Prays With The President	10:30-10:37 AM
Mon., Jan. 20	President Roosevelt's Third Inaugural Ceremonies: Description of Inaugural Parade	2:30- 3:00 PM
Sun., Feb. 9	Prime Minister Churchill reporting from London on "The Progress of World War II"	3:00- 3:37 PM
Sat., Mar. 15	President Roosevelt speaking on "Aid to the Democracies" at the White House Correspondent's Dinner	9:30-10:08 PM
Tues., Mar. 25	Lord Halifax, British Ambassador to the United States, speaking on "British War Aims" at the Pilgrim Society Dinner	10:15-11:08 PM
Sun., Mar. 30	Variety Program, starring Marian Anderson, Ethel Waters, Joe Louis and Duke Ellington, in behalf of the National Urban League's campaign to aid the Negro unemployment problem	5:00- 6:00 PM
Sun., Apr. 13	Pope Pius XII giving his Easter Message from Vatican City	6:00- 6:48 AM
Sun., Apr. 27	Prime Minister Churchill reporting on "The Progress of World War II and American Aid to Britain" from London	4:00- 4:33 PM
Sat., May 10	Colonel Charles A. Lindbergh and others speaking at a rally of the America First Committee	10:15-11:00 PM
Tues., May 27	President Roosevelt clarifying the national policy in a "Fireside Chat" to the nation	10:30-11:15 PM
Sun., June 22	Prime Minister Churchill speaking from London on Hitler's invasion of Russia, followed by a two-way conversation between Elmer Davis in New York and Edward R. Murrow in London on British reaction to Mr. Churchill's speech and the war in general	3:00- 3:27 PM
Thur., June 26	Pope Pius XII addressing the Ninth National Eucharistic Congress in St. Paul, Minn., from Rome	2:00- 2:17 PM
Tues., July 8	Description of All Star Baseball Game from Detroit	2:15- 5:00 PM
Mon., July 21	President Roosevelt proclaiming to Congress that a state of national emergency existed in this country	3:30- 3:50 PM
Sun., Aug. 10	Queen Elizabeth, speaking from England, to thank the American relief organizations for their British Aid	4:00- 4:12 PM
Sun., Aug. 24	Prime Minister Churchill speaking from London on his meeting with President Roosevelt and the progress of the war	4:00- 4:30 PM
Mon., Sept. 1	President Roosevelt's Labor Day Address from Hyde Park	1:46- 2:00 PM
Mon., Sept. 1	Heads of governments in exile in London speaking from that city on the Second Anniversary of World War II	4:00- 4:45 PM
Thur., Sept. 11	President Roosevelt outlining our government's future foreign policy in a talk from the White House	10:00-10:30 PM

[fol. 328]

EXHIBIT "A" TO AFFIDAVIT OF FRANK STANTON—Continued

Day and Date	Program	Time
Thur., Sept. 25	One of the weekday series of descriptions of the "battle" between the Second and Third Armies in Louisiana	4:30- 4:45 PM
Wed., Oct. 15	Secretary of Agriculture Wickard outlining a 1942 farm defense program in his speech on "Food For Freedom"	10:15-10:30 PM
Mon., Oct. 27	President Roosevelt addressing the Navy League Dinner in Washington	10:00-10:30 PM
Tues., Nov. 11	Red Cross Roll Call broadcast: speeches by Vice President Wallace, Secretary of War Stimson, Secretary of Navy Knox; Associate O.P.M. Director General Hillman, and Red Cross President Davis	10:00-11:00 PM
Tues., Nov. 18	Wendell L. Willkie speaking on "A Better Understanding for Labor"	10:30-10:45 PM
Sat., Nov. 29	The Army and Navy annual football classic at Philadelphia	1:15- 4:00 PM
Mon., Dec. 8	President Roosevelt's war message to Congress and description of Congressional voting proceedings	12:15- 1:30 PM
Mon., Dec. 8	Prime Minister Churchill speaking to the United States re: Britain declaring war on Japan	3:00- 3:22 PM
Tues., Dec. 9	President Roosevelt's first wartime Fireside Chat	10:00-10:30 PM
Mon. Dec. 15	Bill of Rights Commemoration Program. Brief address by President Roosevelt and drama specially written by Norman Corwin	10:00-11:01 PM

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF EDWARD KLAUBER

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss.:

EDWARD KLAUBER, being duly sworn, deposes and says:

I am the Executive Vice-President of Columbia Broadcasting System, Inc. (hereinafter called Columbia or CBS), have been its Executive Vice-President since 1936 and have performed the same duties under various other titles since August, 1930. I was previously employed by the New York Times successively in reportorial and editorial capacities for 13 years and prior to that by the New York World for four years. I have been instrumental in the formulation of Columbia's program policies and have had direct supervision of the general execution of such policies.

[fol. 329] The program policies of Columbia, just as the editorial policies of any printed publication, determine its character and the public reputation which it enjoys. The reputation which a printed publication enjoys is reflected in terms of its circulation; the reputation of Columbia is reflected in terms of its listening audiences and the degree to which they trust and rely upon Columbia programs.

Accordingly, Columbia has always striven, in discharging its obligations in the public interest, which it is firmly convinced is also its own long-time interest as a publication, to establish a character and a reputation of the highest order. Its policies with respect to important types of programs have from time to time been incorporated in formal statements, some of which are set forth below.

General Policies Respecting Controversial Public Issues. In the President's annual report to CBS stockholders for the year 1935 appears the following which was a clarification and re-statement of principles which had governed its conduct to an increasing degree since the inception of its business:

"The Columbia Broadcasting System does not sell time to individuals or groups for the discussion of controversial public issues such as, for example, taxation, legislation or regulation. It supplies its time and its facilities as a public duty and refuses to accept pay for it. The sole exception to this principle is that after the candidates for the presidential election have been nominated, we cease giving time to the political parties and for the duration of the campaign, sell it, because during those few months the parties require, and should have, more time than we can afford to give away.

"The Columbia Broadcasting System is charged with editorial responsibility for what goes out over its network. It could not escape this responsibility if it would, and would not escape it if it could. In discharge of this responsibility; we will continue to allot available time for the discussion of public questions to spokesmen for opposing views. In allotting such time, we shall exercise our best and most informed judgment in maintaining program balance. By program balance we mean offering to the public all kinds of entertainment, instruction and information—the well-balanced radio fare which it wants and to

which it is entitled. We shall be further guided in such [fol. 330] allotments of time by day to day developments, by the shifting of public interest, and by the relative importance of topics available for discussion.

"At this point I wish to explain what we mean by editorial control and editorial judgment. We do not censor ideas. We do not ask that the views of any speaker agree with those of any member of our editorial staff nor has Columbia views of its own which must be maintained or protected. Our practice of having proposed addresses submitted to us in advance is based on our direct responsibility for what goes out over our stations. We examine proposed addresses first of all, to determine that they are interesting; second, that they are not libelous or slanderous; and third, that in questions of taste they are properly constructed to be heard in the living rooms of the nation by people gathered together in groups of every conceivable assortment.

"Our reasons for refusing to sell time for public discussion and for insisting upon giving it away instead, are three-fold. First, we believe that we have a public duty to bring such material to our audience regardless of the willingness of others to pay for it. Second, we believe that such discussion should be kept in balance by editorial judgment. If we sold time for the discussion of controversial issues, we would in fairness have to sell to all with the ability and the inclination to buy at a given moment. Thus we should surrender all possibility of regulating the amount of discussion on the air in proportion to other elements of well-balanced programming. Third, and by far the most important, we realize that if we sold time for the discussion of controversial public issues, for the propagation of the views of individuals or groups, we would necessarily allow a powerful public forum to gravitate almost wholly into the hands of those with the means to buy it.

"In conformance with our refusal to sell time for discussion of controversial public issues, we limit our advertisers in their message to the sale of their goods or services, or the promotion of public good will for their industry. As a simple example of what I mean, we would gladly sell time to a common carrier for the promotion of travel, but if we were asked to sell time to such a carrier which it

would use to agitate for new rates or different regulation, we would refuse."

[fol. 331] *Political Broadcasts.* In connection with the sale of time to political parties during campaign periods, noted above, the question of the dramatization of political issues first arose, also during 1935. After the most careful consideration Columbia concluded at that time that it would render only a public disservice if it accepted such dramatizations. I stated, in my letter of December 27, 1935 which was made public, Columbia's reasons for not accepting this form of political broadcast, as follows:

"Appeals to the electorate should be intellectual and not based on emotion, passion or prejudice. We recognize that even the oratorical discussion of campaign issues can be to a degree stamped with the aforementioned flaws, but we are convinced that dramatizations would throw the radio campaign almost wholly over to the emotional side. Then, too, we believe that the dramatic method by its very nature would tend to over-emphasize incidents of minor importance and significance, simply because of the dramatic value. While we realize that no approach to the electorate is absolutely ideal, we believe American voters have long been trained to discriminate among the assertions of orators, whereas we do not believe they could discriminate fairly among dramatizations, so that the turn of national issues might well depend on the skill of warring dramatists rather than on the merits of the issue debated."

News Broadcasts. In the early part of 1939 Columbia expressed its conception of its obligation with respect to dissemination of news, in a letter written by me to an executive of the National Association of Broadcasters, as follows:

"The underlying theory of a democracy is that, if you give people honest grist to grind on, they can reach the right decisions; in other words, the primary service which a broadcasting company can render in the news field is to inform the public as to what is happening and to make as clear as possible the significance of events, rather than to express either its own approval or disapproval or to devote its time to the editorial opinions of some particular commentator. This is especially true since the broadcaster,

if he is to maintain program balance, cannot devote so much time to news that the commentator becomes an incident in the presentation, as well may be the case with the [fol. 332] columnist in a newspaper. If a broadcaster devotes a reasonable amount of time to fair and two-sided discussion of controversial public issues, using representative speakers to give differing points of view, he is providing debate and the expression of opinion on controversial issues in a far more effective way than it can possibly be provided by one or even a handful of commentators, regularly expressing personal points of view on every conceivable subject.

"News periods, therefore, should be devoted to giving the facts emanating from an established news-gathering source, to giving all the color (in the proper sense of the word), and interest, and so on, without intruding the views of the commentator. It further can, and very often should, give as much light as possible on the meaning of events. In other words, the commentator should not say that they are good or bad, in his opinion, but should analyze their significance in the light of known facts, the results of similar occurences, and so on, and in this he of course should always be fair. He is fully entitled to give and should give the opinions of various persons, groups, political parties, and so so, when these are known, leaving the listener to draw his own conclusions after he has been, as well as possible, informed about the event, its meaning, the attitude of persons or groups toward it, the known results of similar things in the past and so on."

On October 17, 1939, shortly after the outbreak of war in Europe, in recognition of our responsibility in the handling of news, we issued a public bulletin to advertisers and others in which we stated:

"CBS is currently broadcasting a carefully planned and regularly spaced schedule of news programs covering the war, with due regard to audience interest and program balance. All news broadcasts, including news sources, news preparation, news announcers and their method of delivery, are subject to CBS supervision and are part of the network's public responsibility. Advertisers are requested to make no plans for new or additional news broadcasts without prior consultation with us."

Even prior to this public announcement, we issued on September 5, 1939, immediately after the outbreak of war in Europe, a general memorandum for the guidance of our own organization. A copy of this memorandum is annexed hereto as Exhibit "A". With the attack on Pearl Harbor [fol. 333] less than a month ago and our formal entry into the war, new problems have arisen. A copy of the current CBS memorandum of instructions to its news organizations is annexed hereto as Exhibit "B".

Religious Broadcasts. Since the early part of 1931 Columbia has not sold time for religious broadcasting. This decision was taken because it was found manifestly unfair to make our facilities available only to such ministers, religious organizations or parishes as happened to have the funds and the desire to buy time. During that year Columbia consulted with various religious leaders and as a result established a Religious Advisory Committee, representative of the outstanding faiths and denominations, which has continuously cooperated and advised with us in our Church of the Air programs to this day. Columbia's religious policy was announced at that time, and was succinctly restated in an office memorandum in 1933 as follows:

"We do not under any circumstances sell time for programs of a religious nature, or make any charge of any sort for the programs of this type which we present on the air, nor do we countenance any programs which are devoted wholly or in part to attacks on the religious faith and convictions of any group of American citizens. We believe it is not in conformity with public interest, convenience or necessity to permit on any pretext whatsoever the use of radio facilities for attacks on the clergy or lay members as representing any denomination.

"Inasmuch as it would be impossible for us to grant all requests received from individual churches and religious groups, for time on the air, we allot a half-hour period for religious broadcasting each Sunday morning and afternoon. These periods are assigned to the major established faiths, namely, Protestant, Jewish and Catholic, Christian Science, Mormon and Dutch Reform. The outstanding denominations of the Protestant Church are included in this group.

"The arrangements covering our religious services are made by us after careful consideration and consultation with representatives of the faiths and denominations presented on the air. It is our desire and policy to have these

[fol. 334] programs conform as nearly as possible to the regular morning and afternoon services held within churches. We do not schedule any one individual for a series of religious programs, believing we will render a more progressive and beneficial service by enabling the nation as a whole to hear the greatest number and largest variety of our distinguished religious leaders. We consider also that this practice encourages and helps to develop new leaders.

"It is our plan and desire to make the Church of the Air services representative of the outstanding religious thought in the country and representative, as well, of all the geographical sections of the country; to insure their being both nationwide and international in their scope. Programs are presented by some of the most outstanding religious leaders in Europe, in England, Ireland and Canada. During Lent and Holy Week special series of broadcasts are arranged from the great cathedrals and distinguished leaders speak from their pulpits or from our studios in commemoration of this religious period.

"It is recognized, of course, that there are numerous other groups of our citizenry who are followers of religious teachings or concepts which are not included in the faiths enumerated above. Our policy is not formulated upon a discrimination against any one or all of them; but is based primarily upon a consideration of the public interest and necessary limitation upon available time."

Columbia's basic policies with respect to the treatment of children's programs, length of advertising messages, advertising products in good taste, and other basic practices relating to commercial programs are set forth in Columbia's statement of May 15, 1935, a copy of which is annexed as Exhibit "B" to Mr. Paley's affidavit herein verified October 30, 1941.

Edward Klauber.

Subscribed and sworn to before me this 5th day of January, 1942. George A. Burwell, Notary Public. N. Y. Co. Clk's No. 527, Reg. No. 3B800; Kings Co. Clk's No. 119, Reg. No. 3459; Bronx Co. Clk's No. 62, Reg. No 248B43; Queens Co. Clk's No. 2167, Reg. No. 8330. Certificates filed in Westchester and Richmond Counties. Commission Expires March 30, 1943. (Seal.)

[fol. 335] EXHIBIT "A" TO AFFIDAVIT OF EDWARD KLAUBER

September 5, 1939.

CBS European War Coverage

A Memorandum Governing General Operations for the Information of the Organization

This memorandum is issued to formalize and amplify the instructions under which we have been operating ever since the crisis developed.

Our plan of operation represents no basic change in the policy which this company has maintained in the past. This policy has been to deal honestly, accurately and fairly with the news and with public discussion.

Columbia's announced policy of having no editorial views of its own and not seeking to maintain or advance the views of others will be rigidly continued.

President Roosevelt said in his address to the nation on Sunday night that America is the best informed nation in the world. This is because we have in America a free radio and a free press. We shall continue to keep America as well informed as possible on all phases of the war, including the propaganda of various nations, and the proposals and discussions which go on in this nation and other nations about war or any aspect of it. We are not responsible if the facts either help or hinder participants in the conflict or either please or displease advocates in America of any particular line of conduct here or elsewhere.

Columbia, as an organization, has no editorial opinions about the war. It has no editorial opinions about what this country or any other country should or should not do. Those, therefore, who are its voice in presenting or analyzing the news must not express their own feelings. This does not preclude informed appraisals of the meaning of facts. The opinion phase of the situation will be covered by speakers under our usual policy for the fair discussion of controversial public issues.

In being fair and factual, those who present the news for Columbia must not only refrain from personal opinion, but must refrain from microphone manner designed to cast doubt, suspicion, sarcasm, ridicule or anything of that sort on the matter they are presenting. This should be partic-

[fol. 336] ularly observed when it is necessary to interpolate comment because an address is being received in a foreign language or in running fragments necessitating the filling in of time between breaks. It should always be remembered that the speaker is entitled to get his own point of view over as effectively as he can.

What news analysts are entitled to do and should do is to elucidate and illuminate the news out of common knowledge or special knowledge possessed by them or made available to them by this organization thru its news sources. They should point out the facts on both sides, show contradictions with the known record, and so on. They should bear in mind that in a democracy it is important that people not only should know but should understand, and their function is to help the listener to understand, to weigh, and to judge, but not to do the judging for him.

It is impossible, within any reasonable limits, to define completely this last-mentioned aspect of news analysis. Fairness and temperateness are of its essence.

In this connection, prophecy, so far as possible, should be avoided. It is foolish to say "Germany will be licked in six months." It is perfectly proper to say that certain military experts (or the speaker himself, if he be such an expert) believe, in the light of the following known military facts that the defeat of Germany in six months might be possible. An unexcited demeanor at the microphone should be maintained at all times, though the tempo can of course be varied with the nature of the news. Dire forebodings, leaving the radio audience hanging up in the air and filled with suspense and terror, of our own creation, are not good broadcasting. We should not tell the listener that, at this very moment, innocent women and children may be drowning somewhere in the Atlantic because another ship may have been torpedoed by a German submarine, or anything of that nature.

The basis of our operations is a staff of trained Americans, both in this country and in Europe, most of whom have had news training with newspapers or press associations, and all of whom have had training in broadcasting in general and in our own operations in particular. We are to continue to use Americans as far as possible and all our correspondents abroad have been instructed and will be reinstructed not to make use of foreigners (except on those

[fol. 337] occasions where they are making speeches frankly presenting their own points of view). Foreigners will be used in our regular news coverage only in emergencies when a satisfactory American cannot be immediately obtained. In these cases his nationality is to be stated.

We have three main sources of news: 1) the three press associations—the Associated Press, the United Press, and the International News Service; 2) information possessed or obtained by our own staff of editors in the News Department and our news analysts here and our news staff in Washington, London, Paris, Berlin, Warsaw, Rome and Tokyo, and such other points as we cover from time to time; 3) shortwave broadcasts by government-owned European stations and miscellaneous sources of information of various sorts.

In making use of all of these sources, we must at all times be careful to label information for what it is, using the same kind of care that is habitually used by press associations and good newspapers. We must try to distinguish fact from rumor, official information from semi-official 'high sources' and so on, and from mere gossip. Of course the greatest weight should be given to those things known to be factual. We should make known at frequent intervals that the news received from many sources is censored and that, therefore, it may be incomplete and at times even inaccurate.

If all our own people presenting news will present it in this way and analyze it with due weight given to these factors, we can keep the American public very well informed on every phase of things as they develop, help them continually to appraise and weigh the news, and make them well aware of current opinion throughout the world. It must be recalled that this opinion is, in itself, a fact. For instance, if the British people believe that the Germans are committing atrocities, the fact of their belief is important. That these atrocities are real, false, or unproven is another fact. Broadcasting of properly identified fact, allegation, opinion, rumor and all the other attendant circumstances in which the conflict progresses will continue to keep the American listener the best informed in the world. In no other way can he know all that he should know.

In presenting the addresses of foreign statesmen and other speakers, we will be guided solely by news judgment

[fol. 338] (in the light of program balance). If we present them when the given situation indicates that they should be heard over here, we shall do a fair and honest news job. We will have to use our best efforts to overcome the handicap of one side not talking our language. We also will have to be guided by the breaks of the news. For example, if Hitler speaks one day and no one else does, or if Chamberlain speaks and no one else does, it would of course be silly to leave off the speech of one side because we had none from the other. An excellent example of how fair and comprehensive broadcasting can be was furnished on Sunday, when there were speeches from London, from Paris, and from Canada, but none in Germany which were made available for broadcasting. We succeeded in obtaining the text of various Hitler proclamations and statements and presented his side perhaps just as well as if he had spoken.

The point in the foregoing and in guiding much of our operation is that, if we will honestly and sincerely try to present the news, regardless of which way it points, we shall do a much better job than if we merely strive for a sort of mathematical fairness. Let us take for example the round-ups of editorial opinion which we occasionally present. Decision to present one of these should be based solely on a belief that newspaper reaction to a given thing (the British-French declaration of war, or the President's speech at the outbreak of the war) is of great interest to the general public. As long as we present them on this basis, we are being honest and fair. The minute we presented one because somebody here had some personal desire to influence public opinion on some given question, we should be operating badly. By the same token, if we refrained from presenting one because it did not reflect the point of view we had hoped for, or if we selected editorials to make a particular point of view emphatic, we would be doing an intolerable kind of job. I know this would never happen here; I mention it merely by way of illustration.

The same thing applies to presenting either individual broadcasts of European government stations or a summary of such operations for a given day. If we were merely on a mathematical basis to present so many minutes of each, it might very often be dull and tedious. If, with honest news judgment, we pick out what is salient, we will do a good job even though on one occasion we might present

[fol. 339] nothing except that which had been said over a German station or some station presenting the point of view of the other side. Here, too, we must be guided by honest, sincere news judgment and our fundamental purpose of presenting all points of view as the breaks of the news require.

We come now to the question of speeches over here on public questions related to the war. Here we shall follow our traditional policy. If there are persons in America who think we should enter the war and others who think we should keep out, we shall permit the public debate of this question, selecting as far as possible, speakers with varying points of view. We cannot do an honest job for the American public without letting them know that there are varying opinions and that these opinions are being agitated. In the same way, if, for example, the President, proposes repeal of the present Neutrality Act, we shall carry as fully as possible the outstanding debate on this issue. The amount of debate naturally will be gauged by the public interest in the current question, its importance and the imminence of action.

Our own purveyors of news over the air, both here and abroad, will be free to deal with controversial issues discussed in speeches, the same as they deal with any other phase of the general situation. For instance, they may give factual information about the progress of the argument, and our broadcasters from abroad may tell how those countries feel, what their officials are doing, if anything, towards trying to influence a given issue over here, and so on, as long as the broadcaster himself refrains from doing anything that comes out of himself which is designed to influence action one way or the other.

This memorandum has purposely been made lengthy in the hope of clarifying the thinking of all concerned about the general principles which will guide us in broadcasting the war. As a final word, it should be remembered that Americans should know everything we can possibly tell them about every phase of the situation, provided only that it is important that we put it out for exactly what it is, that we do our best to inform and explain with honesty and sincerity, and thus demonstrate once more that radio plays a tremendous part in the maintenance of all that is best in a democracy.

Edward Klauber, Executive Vice-President.

[fol. 340] EXHIBIT "B" TO AFFIDAVIT OF EDWARD KLAUBER

Columbia's War Coverage

A Memorandum to the CBS News Organization

President Roosevelt has said that America is the best informed nation in the world. This is because we have a free radio and a free press. In war time it becomes more important than ever that we should continue to be the best informed people in the world. This is essential for two reasons; first, in order that military and civilian morale be kept at the highest possible level so that we may win the war and win it as quickly as possible. Second, in order that the nation may be kept keenly conscious of why we are fighting this war, to the end that we may also win the peace.

This is a war for the preservation of democracy. The American people must not only always be kept vividly aware of this objective but of the value to every man, woman and child in the nation of preserving democracy. Thus we shall become capable of the utmost nation-wide effort and endurance because we shall all share a common knowledge of the nation's purpose in war.

And that same common knowledge and common valuation of our national heritage will do more than any one thing to insure that we win the peace. The peace will be won if, after victory in the war, and regardless of what we may have to endure, in the immediate post-war years, we shall hold fast to democracy and the essential freedoms.

In keeping America the best informed nation in the world in war time we obviously face new difficulties and certain limitations. We should do our utmost to surmount the difficulties and to circumscribe the limitations to absolutely essential areas and to apply them, even within those areas, with common sense and judgment. In other words let us never adopt a negative attitude of fear and retreat, so that we search out for ourselves self-imposed areas of intellectual black-out. Rather let us try to keep on illuminating every area of the national life, our own military effort and the manifold phases of the world struggle, as far as we can possibly do so with assurance that we are doing good and not harm. Thus, we will be using all our skill and judgment in adopting our trained resources of man-power and [fol. 341] our technical facilities to shedding light and not

darkness. This of course we must do without running counter to the national objectives.

There is not room within the scope of this memorandum to do more than hint at the reasons why it is more important than ever to keep the American people the best informed in the world. Certainly, their habit and their expectation is to know; they are not a regimented or blindly obedient people and their support for what they understand will be incalculably greater than their obedience to blind command. They will surrender anything, including many of their present liberties, if they surrender them consciously and after they are made to understand why they must be given up and if the atmosphere is one of temporary and willing surrender for a common purpose.

Moreover, the American people will trust the civil and military authorities only if they believe and know that as far as is possible and consistent with the military effort the truth is being told to them and they are not being deceived. Besides all this, they will be far less a prey to enemy propaganda than if they are so ill-informed that they may easily fall victims to the destructive effect of every rumor set afloat for the purpose of dismaying and confusing them.

American democracy has functioned always in a spirit of free speech which has involved free and open criticism. This function must be preserved lest any serious mistakes go undetected and uncorrected and lest the people lose confidence in their leaders because they feel that they are being told too little. Any mechanism of suppression for other than immediate military motives almost certainly will eventually fail and then great damage will have been done and ground lost which it will be slow and difficult to regain.

Our news operation in war time, therefore, is not essentially different from what it is in peace time. We simply have to apply the same judgments and the same skills to new problems. We have to be as energetic and resourceful as possible in keeping the radio audience informed; at the same time we have to see to it that we do not broadcast information of military value to the enemy and that we do not cause unnecessary and useless anguish, suspense, or confusion among our own people or any part of them.

Informing the radio audience means, without hysteria and with all due and proper restraint, keeping vividly, color-[fol. 342] fully, and honestly before our people all that is

going on in the world, including both the things that touch the minds and the things that touch the hearts of men. Of course, we must limit ourselves to what can properly be told, and make certain that as far as possible the proper evaluation is placed upon the material and that to the best of our ability we explain and illuminate its meaning.

The restraints we must exercise fall into two categories; (a) self-restraint dictated by common sense, news judgment and our growing experience with changing conditions, (b) full and prompt obedience to any lawful directions given to us by constituted authorities, reserving to ourselves only the right afterwards to discuss with such authorities the wisdom of any directive which we may believe should be rescinded or altered.

In all that we do we must bear in mind that we must never allow competition among broadcasters or between a broadcaster and other media of public information to betray us into recklessness or irresponsibility. Columbia wants to be first with the news whenever it can and as often as it can, but Columbia would rather be last, or never broadcast certain material at all, than to rush on the air with news that should not have been put out. In this connection, it should be remembered that we have in our medium the power of virtually instant correction and we must never hesitate to correct as rapidly as possible any erroneous fact or wrong impression that we may at any time broadcast.

In evaluating news we should, of course, look first of all to official and qualified sources, second to the press associations and our own world-wide news-gathering facilities, and third to rumor, voluntary informants, broadcasts by enemy nations, and so on. Extreme care and vigilance must be used in accepting material from any of the last-mentioned sources. Every possible effort should be made to verify it before its use. If judgment dictates that some of it should be broadcast as unverified rumor or as emanating from enemy sources, it not only should be used with care and reserve, but its precise nature and origin should be carefully pointed out and its probable purpose and meaning should be indicated.

In regard to what constitutes military information that might be of value to the enemy, various government depart- [fol. 343] ments have already indicated definitions. The following subject matter is to be avoided, *unless officially disclosed:*

1. Movements or location of any war or naval vessels or planes, as well as the identity of personnel on such vessels or planes. This, of course, applies to aircraft and seacraft belonging to our Allies as much as to those belonging to the United States.

2. Movements of merchant vessels flying the flag of the United States or of any Ally.

3. Troop movements.

4. Assembly, movement or embarkation of war material.

5. The identity of any American or Allied merchant vessels attacked by the enemy, as well as the identity of any of its officers or crew.

6. Details regarding the strength or activity of any navy or military shore establishment.

7. Any experiments with war material, particularly relating to new inventions.

8. The laying of mines or mine fields.

9. Secret notices or instructions relating to aids to navigation.

10. Weather information. This, at present, is to be treated as a local problem by each station and authorities in each area will determine whether weather reports are to be broadcast.

11. Selective service quotas—area, state or local.

12. Casualty lists.

It should be stressed again that there is no proscription on any of these topics *if they are officially released.* However, CBS news editors should reserve the right of decision as to whether they wish to broadcast certain information even when approval has been granted.

From time to time each CBS news man will receive certain unofficial information within the categories described [fol. 344] above and naturally will wish to broadcast such information if it is releasable. To that end, both the New York and Washington news rooms are now staffed 24 hours a day, seven days a week, and arrangements have been made to check these reports with responsible governmental

bureaus. This service is available not only to the news staffs of CBS owned and operated stations, but also to all affiliated stations.

A most important part of our information continues to come from press associations. However, the very fact that any given piece of news is carried by a press association whose editors also have exercised their judgment before releasing it; does not necessarily mean that Columbia considers the item broadcastable. In other words, all news dispatches should be assayed by Columbia's news editors despite the fact that they already have survived previous judgments.

Now to examine the subject of eyewitness descriptions of air raids when and as they may occur. It is conceivable that an invading plane might carry a receiver purely in the hope that some station would be broadcasting eyewitness reports of the damage inflicted. In that event, any announcer who gave overly specific information regarding damage would be giving information of great value to the enemy. Thus, all announcers and reporters are instructed to bear constantly in mind the dangers of precise descriptive material. It would be far better to withhold one's exact location and say, for instance, "over to my left a big business building appears to have been hit by a bomb," rather than "the First National Bank Building next door to the roof on which I am standing has just been hit".

All air alarms should be handled with considerable care. On the whole, it is advisable not to put out any information regarding alarms until after the all-clear has been sounded or it develops that an actual raid is in progress. To tell in a news period that a certain city is having an air raid alarm will merely succeed in creating fear and panic and will doubtless lead to a complete swamping of long distance telephone facilities by listeners anxious to reassure themselves regarding the safety of friends and relatives in that city. It would be far better to wait and see if the alarm preceded an actual raid or if the all-quiet signal is given before any reference is made to the alarm.

[fol. 345] More than ever before, a calm and unexcited demeanor at the microphone is essential. Naturally, there should be variations in tempo according to the nature of the news. However, all announcers should try to keep a

sense either of foreboding or exultation out of their voices and should keep to as factual a tone as possible no matter what the news. It should be remembered at all times that in warfare it is rare that a single reverse or triumph is decisive. Accordingly, no item should be broadcast so as to cause either exaggerated optimism or create defeatism and despair.

Commercial news broadcast must be watched particularly to prevent news phrases such as "bulletin" and "flash" to be used for purposes of advertising.

It is now, of course, much more important than ever not to permit distortion or over-emphasis of the news through improper dramatization or improper sound effects in connection with news broadcasts. Particularly, of course, there should be no use of sirens or other sound effects which might be construed as air raid alarms or alert signals.

It is necessary to maintain a constant vigil over your news machines and studios during all hours of operation. It is of prime importance not to permit any stranger to enter the news room or studio at or near the time of broadcast. Run the risk of being thought rude because you question visitors unknown to you rather than permit any possibility of an unauthorized broadcast.

Similarly, you should not accept any telephone requests for announcements without being certain of your informant. If there is any doubt in your mind take his telephone number, verify it and call him back.

From time to time as different conditions develop that can not now be foreseen, we intend to issue supplements to this memorandum. They will be sent to every CBS news editor, writer, reporter, announcer and analyst, all of whom are now war correspondents just as much as if they actually were at Headquarters near the front lines. The important thing to all of us is that we build—and keep on building—public confidence in our news. That confidence should prove a valuable machine tool in the production of victory.

Paul W. White, Director of News Broadcasts.

[fol. 345a] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Affidavit of Harold C. Read, Program Service Manager of the Long Lines Department of the American Telephone and Telegraph Company.

UNITED STATES OF AMERICA
Southern District of New York
City, County and State of New York ss:

HAROLD C. READ, being duly sworn, deposes and says:

I am Program Service Manager of the Long Lines Department of the American Telephone and Telegraph Company. On the 25th day of November, 1941, I made an affidavit in the above entitled matter at the request of the Federal Communications Commission relative to the establishment of a network of 64 stations for a one-half hour program once a week giving the charges therefor and information as to the availability of the necessary facilities.

Columbia Broadcasting System, Inc., has requested me to answer the questions enumerated below, which refer to the information contained in my said affidavit.

[fol. 345b] Question #1: With the 52-week charge for the 64 station lineup of $141,504.80, what is the average charge per program, and what is the average charge per station per program?

Answer: The total cost for program transmission service to the 64-station network referred to in my said affidavit is $141,504.80 for one half-hour program per week for 52 consecutive weeks. From mathematical computations this equates to $2,721.25 per program and $42.52 per station per program. The Telephone Company does not quote its charges for a program network service on a per program or per station basis.

Question #2: Does the phrase "per hour or fraction thereof" relating to Schedule "B" mileage rate mean that two consecutive half-hour programs from the same point of origin to the same network of stations would cost no more than for a single half-hour program?

Answer: Under Tariff F. C. C. No. 198, the interexchange channel charge for Schedule "B" service is $.20

per airline mile "per hour or fraction thereof". For the same customer, and the same network and the same stations, the interexchange channel would cost no more for one program of one hour's duration or two consecutive half-hour programs from the same point of origin than it would cost for a single half-hour program or a single program of any lesser duration.

Question #3: If the answer to Question #2 is "yes", what would be the average charge for the service for each program of two consecutive half hours and what would be the charge per station per program on this basis?

Answer: Based on a total cost of $141,504.80 for a half-hour program per week for 52 weeks to the 64-station network referred to above, which is the minimum charge for [fol. 345c] said network for one hour or fraction thereof, the mathematically equated average for each of two consecutive half-hour programs per week (104 half-hour programs during 52 weeks) furnished to the same customer, on the same network and the same stations, and from the same point of origin would be $1,360.62 and the average per station per half-hour program would be $21.26. The Telephone Company does not quote its charges for a program network service on a per program or per station basis.

Question #4: How does the mileage rate for Schedule "B" service compare with the mileage rate for Schedule "A" service, and what is the user entitled to when he purchases Schedule "A" line service?

Answer: Under Tariff F. C. C. No. 198, the interexchange channel rate for Schedule "B" service is $.20 per airline mile per hour or fraction thereof and the interexchange channel rate for Schedule "A" service is $8 for 16 consecutive hours daily per airline mile per month. The $8 per mile per month Schedule "A" interexchange channel rate entitles the user to the use of the interexchange channel for 16 consecutive hours of program service per day or a total of 480 hours in a 30-day month.

Question #5: Approximately at what point in terms of hours of use does the charge for Schedule "B" line service equal the charge for Schedule "A" line service?

Answer: The Schedule "B" interexchange channel charge equals the Schedule "A" interexchange channel charge when a total of 40 hours of Schedule "B" interexchange channel has been furnished within a period of one month. This assumes that the same customer, the same

network and stations, and the same point of origin would be involved.

[fol. 345d] Question #6: When the point is reached can the customer change his basis from Schedule "B" service to Schedule "A" service or is the application of Schedule "A" service rates made automatically by the Telephone Company retroactive to the prior use of Schedule "B" service during the month?

Answer: When within a period of one month the charges to the same customer for any section of a network, at Schedule "B" rates, equal or exceed those that would be obtained by applying to such section the rates for Schedule "A" facilities and services, such section is charged for in accordance with the rates applicable to Schedule "A", except that the interexchange mileage used in the Schedule "B" pricing is used.

Question #7: Would three consecutive half-hour's use of transmission service on the assumed 64-station hookup on each day of the month involve the application of the Schedule "A" rate?

Answer: The furnishing of service to the same customer on the 64-station network referred to above for three consecutive half-hour programs per day would involve the application of Schedule "A" rates as the maximum for the Schedule "B" familities and services provided the point of program origin were the same.

Question #8: What is the connection charge per month for Schedule "A" service on the assumed 64-station hookup?

Answer: The station connection charge for Schedule "A" service of $125 per station per month for 16 consecutive hours service daily would amount to $8,000 per month if the assumed 64-station network were priced at Schedule "A" rates.

[fol. 345e] Question #9: What is the total monthly charge, mileage and connections, for the 64-station hookup for Schedule "A" service assuming, as was done in the prior affidavit, loops to be existing? Converted to a daily basis what is the charge? If three half-hour programs were broadcast each day what would be the charge per station per program? If six programs per day were broadcast what is the charge per station per program? If twelve

programs per day were broadcast what is the charge per station per program?

Answer: The monthly charge for Schedule "A" service for the assumed 64-station network (local channels considered existing) would amount to $90,216 made up as follows:

Interexchange Channel 10,277 airline miles x $8	$82,216
Station Connections 64 stations x $125	8,000
Total	$90,216

Based on a 30-day month the computed average per day would be $3,007.20.

Based on a total monthly charge of $90,216 or a computed average per day of $3,007.20 and assuming that the computed daily average of $3,007.20 were equally apportioned to each of the three half-hour programs, the equated portion for each half-hour program would be $1,002.40 and equally apportioned to each of the 64 stations would be $15.66 per station per half-hour program.

Using this same method of computation, six programs per day would equate to $501.20 per program or $7.83 per station per program.

Likewise, twelve programs per day would equate to $250.60 per program or $3.92 per station per program.

[fol. 345f] The above computations assume that the same customer and the same point of program origin were involved. The Telephone Company does not quote its charges for a program network service on a per program or per station basis.

This affidavit is made at the request of Columbia Broadcasting System, Inc.

Harold C. Read, Program Service Manager.

Subscribed and sworn to before me this 9th day of January, 1942. William John Keener, Notary Public, Nassau County No. 833. Cert. filed in N. Y. County. N. Y. Co. Clk's No. 130, Reg. No. 2K-112. Commission expires March 30, 1942. (Notarial seal.)

[fol. 345g] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted.]

AFFIDAVIT OF HAROLD C. READ, PROGRAM SERVICE MANAGER OF THE LONG LINES DEPARTMENT OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY

UNITED STATES OF AMERICA,
Southern District of New York
City, County and State of New York, ss.:

HAROLD C. READ, being duly sworn, deposes and says:

I am Program Service Manager of the Long Lines Department of the American Telephone and Telegraph Company. I am in charge of the division of the Long Lines Commercial Department of the American Telephone and Telegraph Company which furnishes to radio-broadcast stations and networks facilities for the transmission of programs between various cities in the United States. My functions relative to the furnishing of program transmission facilities are concerned with the commercial aspects of the service and are as follows: to develop and maintain customer contacts, including negotiations with networks [fol. 345h] and radio stations for program transmission service; to cooperate with other Long Lines departments in determining the availability of facilities suitable for the furnishing of program service of the schedule classification desired; to prepare and furnish to customers quotations as to the charges to be applied for the service desired; to furnish the necessary information to other departments for computing service charges for preparing contracts, contract modifications and billing statements for service furnished; to sign contracts and contract modifications and obtain customers' signatures on contracts. I personally participate in negotiations with networks and radio stations relative to program transmission service.

I am generally familiar with the various aspects of the Telephone Company's business relating to the furnishing to networks and radio stations of circuits for the transmission of radio programs to practically every important city in the United States. The circuits required for program transmission service are of various grades, generally of a

higher quality than those required for ordinary speech transmission. Specifically, those required for Schedule "B" (the schedule under consideration in this affidavit) are of high quality and require special equipment of many kinds in addition to special operation and supervision in order to insure the transmission with high fidelity of programs between cities. I am familiar with the terms on which the Telephone Company furnishes to the National Broadcasting Company, the Columbia Broadcasting System, and the Mutual Broadcasting System, the circuits by which they distribute their network programs to their various affiliated stations located throughout the country. I have had experience with technical matters in connection with the furnishing of this service to the three nationwide network organizations.

In connection with the furnishing of program transmission facilities to customers of the Telephone Company, I am required to obtain from other departments of the Long Lines Department information with respect to the availability of facilities, including those furnished by Associate Companies, for the transmission of programs between various cities of the United States. For the purpose of this affidavit, I have obtained from such other departments of the Long Lines Department the information contained herein with respect to the availability of facilities, including [fol. 345i] those furnished by Associate Companies, for the program service in question.

I have studied the information contained on the map entitled, "The No. 1 Advertiser Network Possible after August 1—64 Stations." Representatives of the Federal Communications Commission have requested me to state whether or not the Telephone Company has available sufficient program transmission circuits to connect the 64 stations shown on that map, and also to state what the charge for the furnishing of such circuits would be. I have been asked to assume that a prospective customer of the Telephone Company desires to broadcast a network program on a nationwide basis. He does not wish to utilize any of the established networks, but he has determined to use the facillities of the 64 stations shown on the map, and he wishes to obtain from the Telephone Company the wireline facilities necessary for the transmission of his program to those 64 stations. The program the customer has in mind is for one-half hour each Monday evening beginning at 9:00

P. M. Eastern Standard Time, the program to originate in New York City. The customer intends that the program series is to last for one year, but he desires to have an option to cancel the program series at the termination of any 13-week period. Such an arrangement would be satisfactory to the Telephone Company. The customer does not desire permanent lines between the stations but requests program transmission circuits between the 64 stations on a temporary basis for one-half hour per week, the circuits to have a frequency range from approximately 100 to approximately 5,000 cycles per second. Such temporary high quality service is known as Schedule "B" service.

Radio Station WFAA Dallas, Texas and Station WBAP in Fort Worth, Texas are shown on the map in the alternative. I have been informed that these two stations share time and operate on the same frequency. I have been informed further that, pursuant to a time-sharing agreement dated July 29, 1940, Station WFAA is authorized to operate Monday evenings from 6:30 to 9:30 P. M., Central Standard Time, which is from 7:30 to 10:00 P. M. Eastern Standard Time. Since the one-half hour from 9:00 to 9:30 P. M., Eastern Standard Time, is the period during which the pro- [fol. 345] gram is to be broadcast, the facts which I shall furnish will relate to Station WFAA.

At the present time the Telephone Company has available for the service desired the facilities for connecting only 54 stations out of the 64 stations requested. These 54 stations are shown in the list below. Of these 54 stations, 40 would be reached over regularly established program facilities which have been provided for program service, and 14 over facilities normally in the telephone layout for toll service, but which may be made suitable and available for the desired program transmission service.

Service to the 10 remaining stations cannot be provided until the completion of new construction without impairment of message toll telephone service because all existing program transmission circuits over these routes are in use and because message toll telephone traffic is now at an unusually high level. All of these stations are on main toll routes on which construction now under way or definitely planned will make the necessary facilities available. Such construction is planned for completion on the various dates indicated below. It should be pointed out, however, that

these dates are subject to variation, dependent upon traffic and construction conditions encountered in the future, and there is no assurance that those facilities will be definitely available on the dates indicated.

A. Stations which would be reached over facilities which have been provided for program service:

Portland, Me.	WCSH	Detroit	WJR
Boston	WBZ	Chicago	WMAQ
Providence	WJAR	St. Louis	KMQX
Springfield, Mass.	WBZA	Dallas	WFAA
Hartford	WTIC	Oklahoma City	WKY
Albany (Schenectady)	WGY	Tulsa	KVOO
New York	WJZ	Wichita	KFH
Philadelphia	WFIL	Kansas City	WDAF
Baltimore	WBAL	Omaha	WOW
Washington	WRC	Albuquerque	KOB
Richmond	WRVA	Portland, Ore.	KQW
Charlotte	WBT	Seattle	KOMO
Atlanta	WSB	Spokane	KHQ
Louisville	WAVE	Des Moines	WHO
Cincinnati	WLW	Minneapolis	WCCO
Cleveland	WTAM	Milwaukee	WTMJ
Pittsburgh	KDKA	Denver	KOA
Buffalo	WBEN	Salt Lake City	KSL
Rochester	WHAM	Los Angeles	KFI
Syracuse	WSYR	San Francisco	KPO

Total—40 Stations

[fol. 345k] B. Stations which would be reached over circuits normally in the regular telephone message layout but which can be made suitable and available for program service.

Bangor	WLBZ	Birmingham	WBRC
Roanoke	WDBJ	Columbia	WIS
Orlando	WDBO	Charleston	WCSC
Tampa	WFLA	Jacksonville	WJAX
Miami	WQAH	Houston	KPRC
Chattanooga	WDOD	San Antonio	WOAI
Knoxville	WROL	Duluth	WZBC

Total—14 Stations

C. Stations which could be connected to the proposed program network upon completion of construction now under way or definitely planned:

		Date Facilities are Expected to be Available
Raleigh	WPTF	4-1-42
Nashville	WSM	7-1-42
Memphis	WMC	5-1-42
Little Rock	KARK	5-1-42
Jackson, Miss.	WJDX	5-1-42
New Orleans	WWL	3-1-42
Shreveport	KWKH	4-1-42
Fargo	WDAY	7-1-42
Bismarck	KFYR	7-1-42
Phoenix	KTAR	5-1-42

Total—10 Stations

Charges for Program Transmission Service

Exhibit No. 1 and Exhibit No. 2 attached hereto have been prepared in order to illustrate the method utilized by the Telephone Company in accordance with its Tariff F.C.C. No. 198 in determining the pricing mileage on which the interexchange channel charges for the proposed service are based. The exhibits show the shortest airline mileages between the various stations on the advertiser network. The exhibits represent simply pricing layouts and the lines do not represent the routes of the actual program transmission circuits. The charges for these circuits are computed not on the basis of the actual length of the circuits but on the basis of the shortest airline mileage connecting the service and junction points. The cities on Exhibit 1, which are not connected to the network by lines are those which could be connected to the program network only upon the completion of additional construction.

It is assumed that existing local loops already furnished each station connecting each station with the telephone exchange in its city will be utilized and that, therefore, the [fol. 345I] charges for local loops will be paid by each station and will not be billed to the customer who is requesting the program transmission service.

The total charges applicable at present rates, as filed in Tariff F.C.C. No. 198 of the American Telephone and Telegraph Company, Long Lines Department, for the network comprising the 54 stations to which the Telephone Company could supply program transmission circuits at the present time, are as follows:

a. *Mileage Charges*

Total pricing mileage (layout shown on Exhibit 1) 8,783 airline miles.

Schedule "B" rate per mile per hour or fraction thereof, $ .20.

Total mileage charges, 8,783 x $ .20 or $1,756.60 for one-half hour.

This mileage charge would be the same for each weekly half-hour of use.

b. *Switching Charges*

Associated with the first program there would be a switching charge of $.50 per station for disconnecting the local loop at each station at the conclusion of the program.

54 stations x $.50 = $27 switching charge for first program.

Associated with each succeeding program (except the last one) there would be a switching charge of $1 per station—$.50 for connecting the local loop at the start of the program and $.50 for disconnecting the local loop at the conclusion of the program.

54 stations x $1 = $54 switching charge for each intermediate program.

Associated with the last program there would be a switching charge of $.50 per station for connecting the local loop at the start of the program. No switching charge would apply for the final disconnection.

54 stations x $.50 = $27 switching charge for last program.

In addition to the above switching charges there will be other charges if rearrangements of existing services are necessary to make the assumed existing local loops available for this service.

[fol. 345m] *c. Other Charges*

For each station connected, station connection charges would apply as follows:

(1) A charge of $30 per month for each station, applied on a monthly basis only.

54 stations x $30 = $1,620 per month.

(2) A charge of $2.50 per station for each hour or fraction thereof of use.

54 stations x $2.50 = $135 per one-half hour program.

On the above basis the total charges applicable would be as follows:

A. *One program (one-half hour duration)*

Loops (assumed to be existing)		No charge
Mileage (8,783 x $.20)		$1,756.60
Switching (54 x $.50)		27.00
Station connection—Monthly basis (54 x $30)		1,620.00
Hourly basis (54 x $2.50)		135.00
Total		$3,538.60

B. *One Year (52 Programs, one-half hour duration)*

Loops (assumed to be existing)		No charge
Mileage (8,783 x $.20 x 52)		$91,343.20
Switching		
1st Program (54 x $.50)	$ 27.00	
Intermediate Program (54 x $1.50)	2,700.00	
Last Program (54 x $.50)	27.00	
		2,754.00
Station connection—		
Monthly basis (54 x $.30 x 12)		19,440.00
Hourly basis (54 x $2.50 x 52)		7,020.00
Total charge for one year		$120,557.20

One year to have 52 weekly programs would consist of twelve months—four months containing five programs each and eight months containing four programs each. Charges for the circuits for a 54-station network for a month contain-

ing five programs and for a month containing the four programs would be as follows:

[fol. 345n]

	Five Program Month	Four Program Month
Loops (assumed to be existing)	No charge	No charge
Mileage (8.783 x $.20 x 5)	$ 8,783.00	
(8.783 x $.20 x 4)		$7,026.40
*Switching (54 x $1 x 5)	270.00	
(54 x $1 x 4)		216.00
Connection (54 x $30)	1,620.00	1,620.00
Operation (54 x $2.50 x 5)	675.00	
(54 x $2.50 x 4)		540.00
	$11,348.00	$9,402.40

Charges for Circuits for 64-Station Network

After the circuits for a complete 64-station network could be provided by the Telephone Company, the total charges applicable at present rates as filed in Tariff F.C.C. No. 198 of the American Telephone and Telegraph Company, Long Lines Department, would be as follows:

a. *Mileage Charges*

Total pricing mileage (layout shown on exhibit 2), 10,277 airline miles.

Schedule "B" rate per mile per hour, $.20.

Total mileage charges, 10,277 x $.20 or $2,055.40 for ½ hour.

This mileage charge would be the same for each weekly half hour of use.

b. *Switching Charges*

Associated with the first program there would be a switching charge of $.50 per station for disconnecting the local loop at each station at the conclusion of the program.

*Switching charge will be reduced by $27 for first month and $27 for last month since no charge is applied for connecting the local loop to the connection for the first program and no charge is applied for disconnecting the local loop from the connection on the last program.

64 stations x \$.50 = \$32 switching charge for first program.

[fol. 345o] Associated with each succeeding program (except the last one) there would be a switching charge of \$1 per station—\$.50 for connecting the local loop at the start of the program, and \$.50 for disconnecting the local loop at the conclusion of the program.

64 stations x \$1 = \$64 switching charge for each intermediate program.

Associated with the last program there would be a switching charge of \$.50 per station for connecting the local loop at the start of the program. No switching charge would apply for the final disconnection.

64 stations x \$.50 = \$32 switching charge for last program.

In addition to the above switching charges there will be other charges if rearrangements of existing services are necessary to make the assumed existing local loops available for this service.

e. *Other Charges*

For each station connected, station connection charges would apply as follows:

(1) A charge of \$30 per month for each station, applied on a monthly basis only;

64 stations x \$30 = \$1,920 per month.

(2) A charge of \$2.50 per station for each hour or fraction thereof of use.

64 stations x \$2.50 = \$160 per program.

On the above basis the total charges applicable would be as follows:

A. *One Program (one-half hour duration)*

Loops (assumed to be existing)		No charge
Mileage (10,277 x \$.20)		\$2,055.40
Switching (64 x \$.50)		32.00
Station connection—	Monthly basis (64 x \$30)	1,920.00
	Hourly basis (64 x \$2.50)	160.00
		\$4,167.40

B. *One Year (52 programs, one-half hour duration)*

Loops (assumed to be existing)		No charge
Mileage (10,277 x $.20 x 52)		$106,680.80
Switching		
1st Program (64 x $.50)	32.00	
Intermediate Program, (64 x $1 x 50)	$3,200.00	
Last Program (64 x $.50)	32.00	
		3,264.00
Station connection—		
Monthly basis (64 x $20 x 12)		23,040.00
Hourly basis (64 x $2.50 x 52)		8,320.00
Total charge for one year		$141,504.80

[fol. 345p] One year covering 52 weekly programs would consist of twelve months—four months containing five programs each and eight months containing four programs each. Charges for a month containing five programs, and for a month containing four programs, would be as follows:

	Five Program Month	Four Program Month
Loops (assumed to be existing)	No charge	No charge
Mileage (10,277 x $.20 x 5)	$10,277.00	
(10,277 x $.20 x 4)		$8,221.60
*Switching (64 x $1 x 5)	320.00	
(64 x $1 x 4)		256.00
Connection (64 x $30)	1,920.00	1,920.00
Operation (64 x $2.50 x 5)	800.00	
(64 x $2.50 x 4)		640.00
	$13,317.00	$11,037.60

Costs Involved in Changing Origination Point of Program

In connection with changing the origination point of the program, two situations must be distinguished.

*Switching charge will be reduced by $32 for first month and $32 for last month since no charge is applied for connecting the local loop to the connection for the first program and no charge is applied for disconnecting the Local loop from the connection on the last program.

(a) Originating the program in its entirety at Los Angeles rather than New York; and,

(b) Providing for the origination of the program either at New York or at Los Angeles, or part in one city and part in the other, as the individual broadcast require.

In the case of (a) above, assuming that the weekly program originates in its entirety at Los Angeles rather than New York, the same conditions would apply as in the case of the program originating in its entirety at New York. The same charges would be applicable as in the case of both the 54-station and the 64-station networks set forth above.

In the case of (b) above, using the facilities included in the above charges for both the 54 and the 64-station networks, it would not be possible during an individual broadcast to originate part of the program at Los Angeles and part in New York. However, if the customer desired such [fol. 345q] an arrangement, this could be done by providing an additional circuit from Los Angeles to New York, which is at present available and over which the Los Angeles portion of the program would be sent to New York and transmitted over the network from that point. Such additional circuit for either the 54 or the 64-station network would cost $553.60 for the first weekly program within any given month, this charge being made up as follows:

Local loops (assumed to be existing)	No charge
Mileage Charge (2,438 mi. x $.20)	$487.60
Station Connection Charges—Monthly Basis ($30 x 3)	60.00
Station Connection Charges—Hourly Basis ($2.50 x 2)	5.00
Switching Charge (2 at $.50)	1.00
Total	$553.60

For succeeding programs within the same month, the charge would be $494.60 made up as follows:

Local Loops (assumed to be existing)	No charge
Mileage Charge (2,438 mi. x $.20)	$487.60
Station Connection Charges—Hourly Basis ($2.50 x 2)	5.00
Switching Charges (4 at $.50)	2.00
Total	$494.60

The above statements regarding the availability of circuits are based upon a request for one such network and predicated upon present conditions.

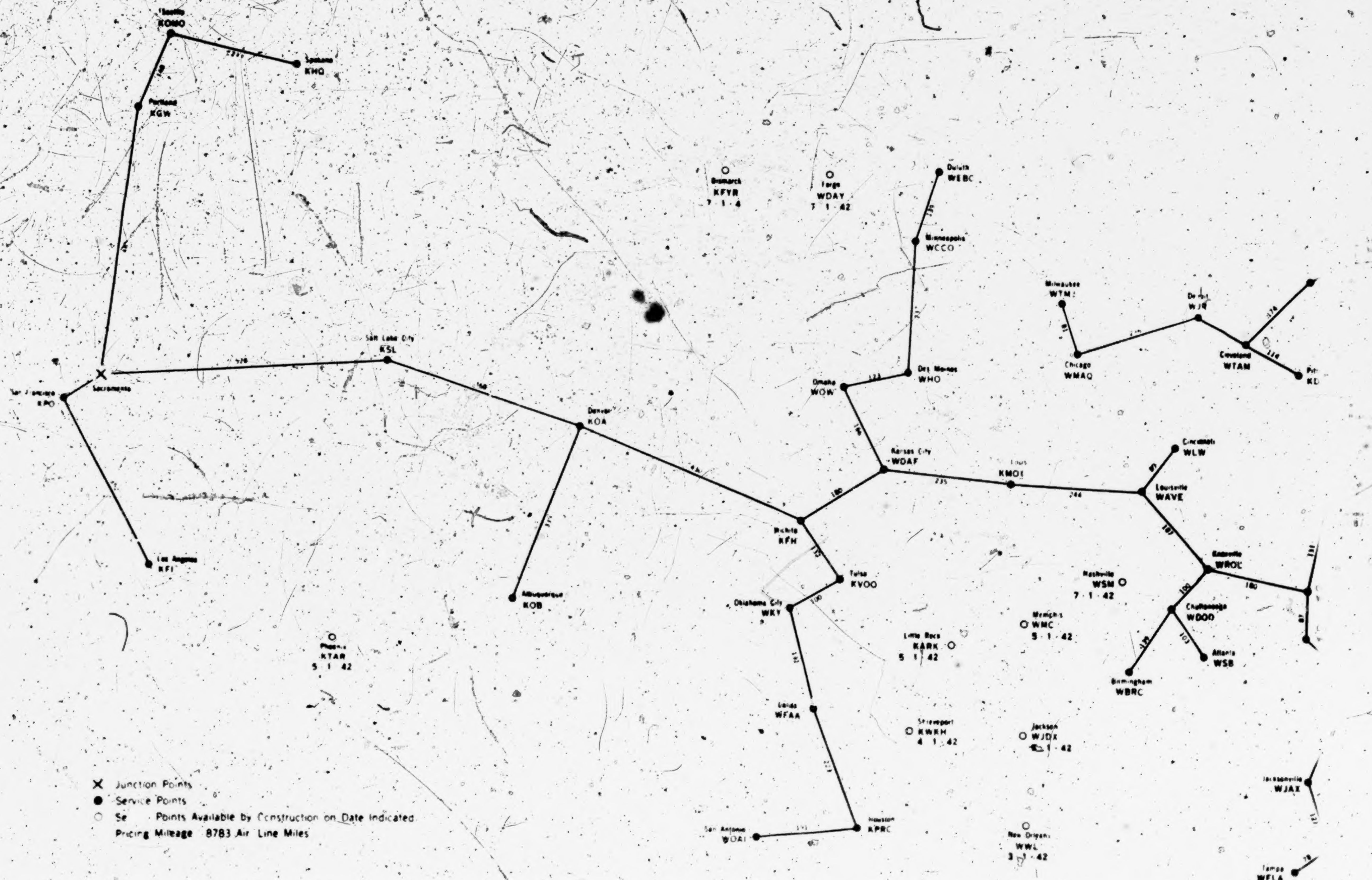
(Signed) Harold C. Read, Program Service Manager.

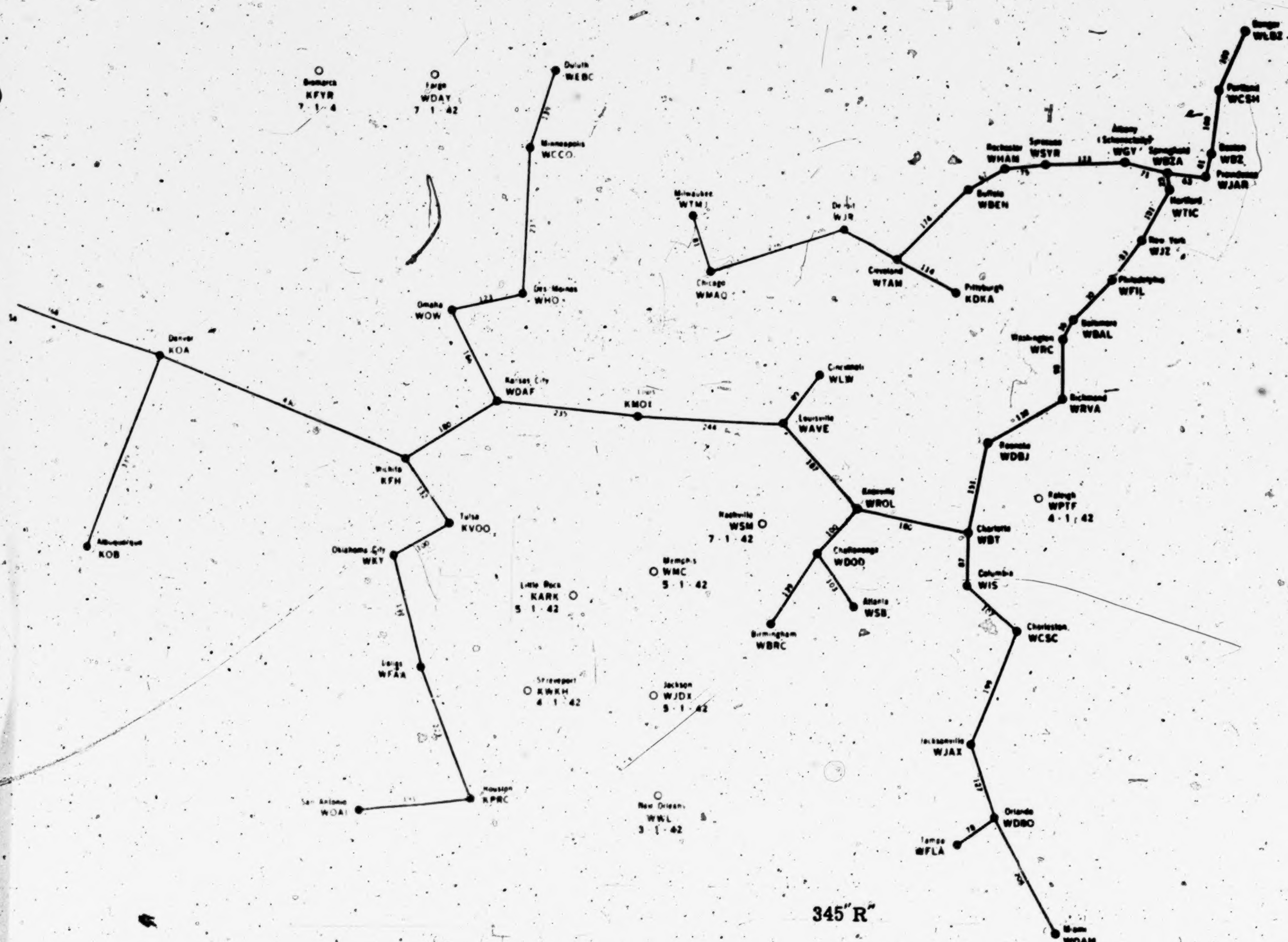
Subscribed and sworn to Before Me This 25th Day of November, 1941.

(Signed) William John Keener, Notary Public, Nassau County, No. 833 (Seal.) Cert. filed in N. Y. County, N. Y. Co. Clk's No. 130. Reg. No. 2K-112. Commission expires March 30, 1942.

(Here follows 2 Photolithographs, Side folios 345r-345s)

EXHIBIT NO. 1

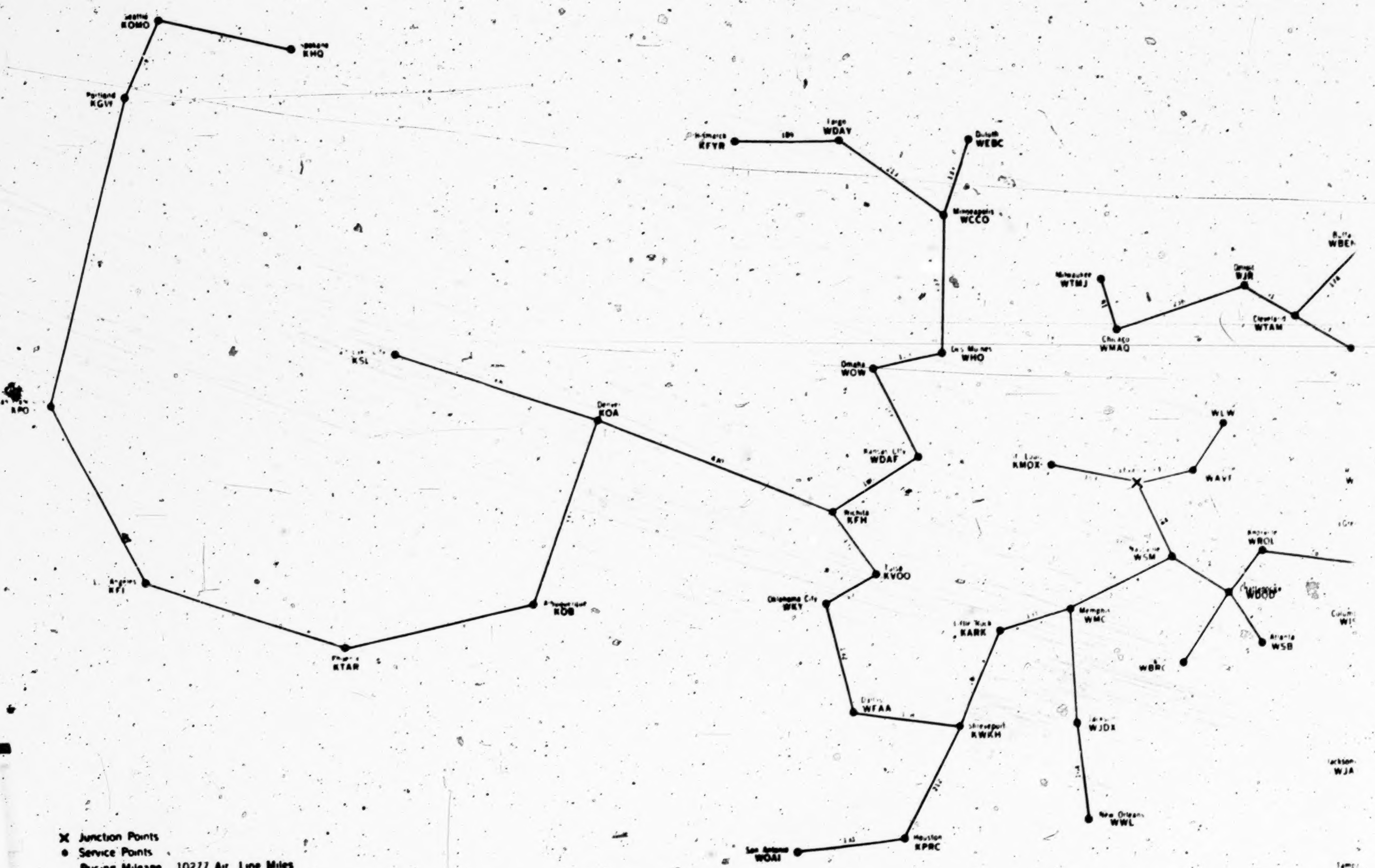

Seattle KOMO
Spokane KHQ
Portland KGW
San Francisco KPO
Sacramento
Los Angeles KFI
Salt Lake City KSL
Denver KOA
Albuquerque KOB
Phoenix KTAR 5 1 42
Bismarck KFYR 7 1 4
Fargo WDAY 7 1 42
Duluth WEBC
Minneapolis WCCO
Des Moines WHO
Omaha WOW
Kansas City WDAF
KMOX
Wichita KFH
Tulsa KVOO
Oklahoma City WKY
Dallas WFAA
Houston KPRC
San Antonio WOAI
Little Rock KARK 5 1 42
Shreveport KWKH 4 1 42
Memphis WMC 5 1 42
Jackson WJDX
New Orleans WWL
Nashville WSM 7 1 42
Milwaukee WTMJ
Chicago WMAQ
Cleveland WTAM
Cincinnati WLW
Louisville WAVE
Knoxville WROL
Chattanooga WDOD
Atlanta WSB
Birmingham WBRC
Jacksonville WJAX
Tampa WFLA
Junction Points
Service Points
Se Points Available by Construction on Date Indicated
Pricing Mileage 8783 Air Line Miles



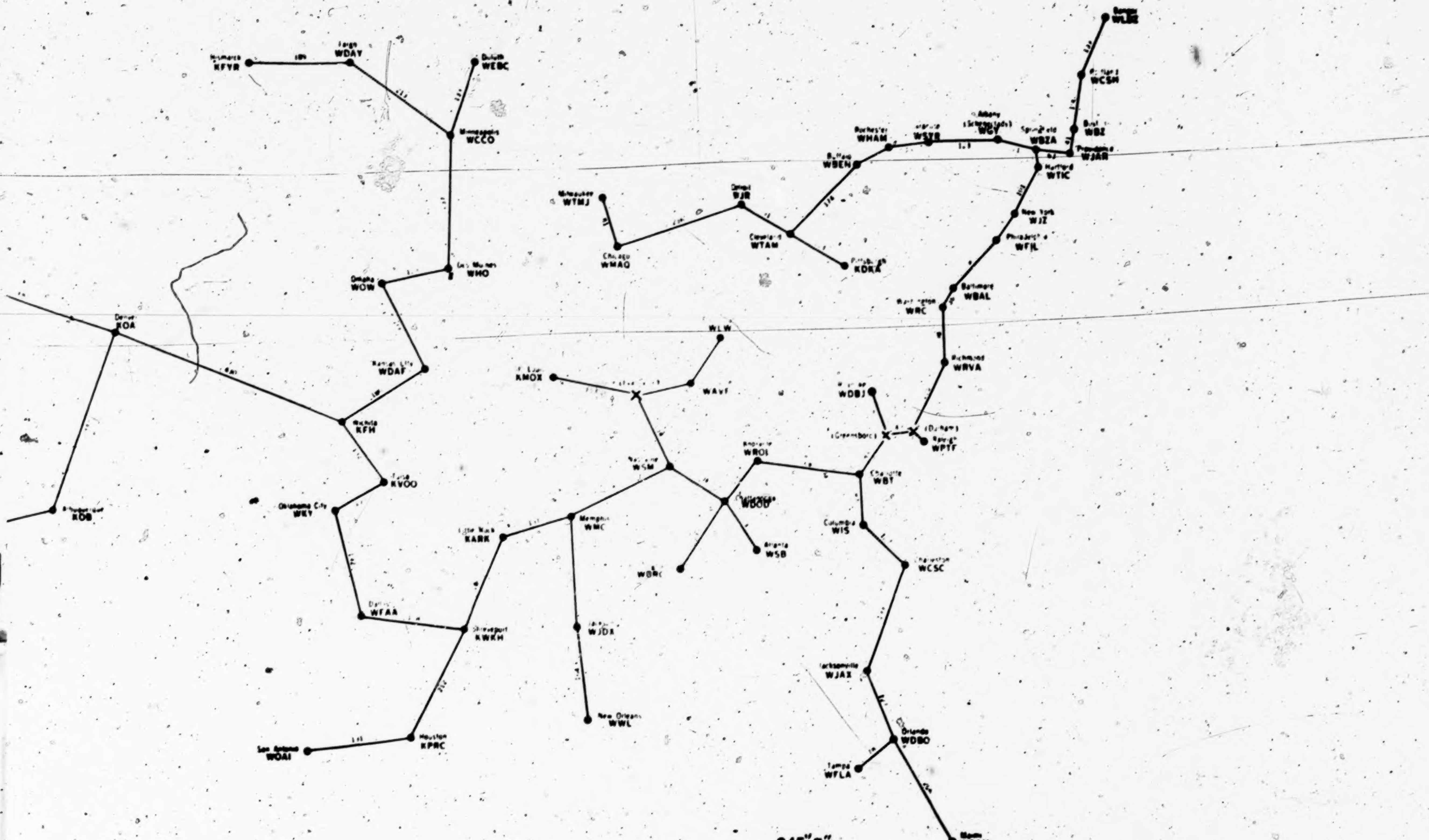
Bismarck
KFYR
Fargo
WDAY
7 1 42
Duluth
WEBC
Minneapolis
WCCO
Des Moines
WHO
Omaha
WOW
Denver
KOA
Kansas City
WDAF
KMOX
Wichita
KFH
Tulsa
KVOO
Albuquerque
KOB
Oklahoma City
WKY
Dallas
WFAA
Houston
KPRC
San Antonio
WOAI
Little Rock
KARK
5 1 42
Shreveport
KWKH
4 1 42
Memphis
WMC
5 1 42
Nashville
WSM
7 1 42
Jackson
WJDX
5 1 42
New Orleans
WWL
3 1 42
Milwaukee
WTMJ
Chicago
WMAQ
Detroit
WJR
Cleveland
WTAM
Pittsburgh
KDKA
Cincinnati
WLW
Louisville
WAVE
Knoxville
WROL
Chattanooga
WDOD
Birmingham
WBRC
Atlanta
WSB
Buffalo
WBEN
Rochester
WHAM
Syracuse
WSYR
Albany (Schenectady)
WGY
Springfield
WBZA
Hartford
WTIC
New York
WJZ
Philadelphia
WFIL
Baltimore
WBAL
Washington
WRC
Richmond
WRVA
Roanoke
WDBJ
Raleigh
WPTF
4 1 42
Charlotte
WBT
Columbia
WIS
Charleston
WCSC
Jacksonville
WJAX
Orlando
WDBO
Tampa
WFLA
Miami
WQAM
Boston
WBZ
Providence
WJAR
Portland
WCSH
Bangor
WLBZ

345"R"

EXHIBIT NO. 2



X Junction Points
• Service Points
Pricing Mileage 10277 Air Line Miles


Bismarck KFYR
Fargo WDAY
Duluth WEBC
Minneapolis WCCO
Des Moines WHO
Omaha WOW
Denver KOA
Kansas City WDAF
Wichita KFH
Tulsa KVOO
Oklahoma City WKY
Albuquerque KOB
Dallas WFAA
Shreveport KWKH
Houston KPRC
San Antonio WOAI
Little Rock KARK
Memphis WMC
Jackson WJDX
New Orleans WWL
Nashville WSM
St. Louis KMOX
WLW
WAVE
Chattanooga WDOD
Atlanta WSB
WBRC
Knoxville WROL
Charlotte WBT
Columbia WIS
Charleston WCSC
Jacksonville WJAX
Orlando WDBO
Tampa WFLA
Miami WQAM
Roanoke WDBJ
(Greensboro)
(Durham)
Raleigh WPTF
Richmond WRVA
Washington WRC
Baltimore WBAL
Philadelphia WFIL
New York WJZ
Hartford WTIC
Providence WJAR
Springfield WBZA
Boston WBZ
Portland WCSH
Bangor WLBZ
Albany (Schenectady) WGY
Syracuse WSYR
Rochester WHAM
Buffalo WBEN
Detroit WJR
Cleveland WTAM
Pittsburgh KDKA
Milwaukee WTMJ
Chicago WMAQ

345"S"

[fol. 346] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF TELFORD TAYLOR IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

DISTRICT OF COLUMBIA, ss:

TELFORD TAYLOR, being duly sworn says:

(1) That he is the General Counsel of the Federal Communications Commission and as such is familiar with the Commission's proceedings taken under Order No. 37, Docket No. 5060.

(2) The said proceedings are as set forth in affiant's affidavit annexed to defendants' Motions to Dismiss the Complaint, or in the Alternative, for Summary Judgment, dated November 5, 1941.

(3) A certified copy of said proceedings has heretofore been filed with this Court in conjunction with defendants' Motions to Dismiss the Complaint, or in the Alternative, for Summary Judgment. It is incorporated herein by reference as Exhibit A.

(4) Affiant submits that Exhibit A is relevant on the issues sought to be raised by plaintiff's Motion for Preliminary Injunction and shows that said Motion should not be granted.

(Signed) Telford Taylor.

Subscribed to and sworn before me this — day of December, 1941. —— ——, Notary Public.

[fol. 347] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FRED WEBER, GENERAL MANAGER OF MUTUAL BROADCASTING SYSTEM, INC., IN OPPOSITION TO MOTIONS FOR PRELIMINARY INJUNCTION

STATE OF NEW YORK,
County of New York, ss:

Fred Weber, first being duly sworn, on oath deposes and says:

I

Affiant

Affiant is, and since the organization of Mutual in the fall of 1934 has been, in the employ of Mutual Broadcasting System, Inc. (herein referred to as "Mutual"), with the title of coordinator until 1936, and since then with the title of general manager. Affiant is, and since the outset has been, a member of the Board of Directors of Mutual. Subject to the authority of the Board of Directors and the corporate officers of Mutual, none of whom (except the auditor) is paid any salary or other compensation by Mutual, affiant has at all times been, and is, the principal executive officer of Mutual, with active duties ranging over the entire field of Mutual's activities and operations. From 1926 to 1933 affiant was in the employ of plaintiff, National Broadcasting Company, Inc., serving successively in the commercial engineering, stations relations, and sales departments of that company. In 1933 affiant became vice-president and general manager of American Broadcasting System, a company which was organized in that year and which for a period of six months attempted without success to operate a national network. By reason of his past and present experience and duties, affiant is thoroughly familiar with the business of network broadcasting, embracing, and with particular reference to its competitive aspects, including present and past efforts, practices, and policies of the several national network organizations, in competing with each other in the sale of time to advertising agencies, advertisers, and others, and in securing desirable [fol. 348] independently-owned broadcasting stations located in cities throughout the United States and elsewhere in North America to serve as network affiliates and as outlets for the broadcasting of network programs. Affiant appeared as a witness in behalf of Mutual in the proceedings before the Commission now under review (see transcript of record, pages 5116-5230 and 8249-8298) and actively participated in the preparation of exhibits and generally of Mutual's presentation before the Commission. Affiant also testified in behalf of Mutual at the hearing before the Senate Committee on Interstate Commerce on the so-called White Resolution (S. Res. 113) in June, 1941, on the subject-matter of the Commission's order now before this

Court. Affiant has read and is familiar with the contents of the affidavits of Niles Trammell, William S. Paley and others heretofore filed with this Court in support of the motions of plaintiffs National Broadcasting Company, Inc., and Columbia Broadcasting System, Inc. (hereinafter referred to as National and Columbia) for temporary injunction and temporary restraining order, and makes this affidavit in opposition to said motions.

II

Mutual Broadcasting System, Inc.

1. *Corporate organization.* Mutual is an Illinois corporation organized October 29, 1934, with its principal office in Chicago, Illinois. The facts with respect to its history, business, and corporate organization from the date of its incorporation are correctly set forth in the Commission's Report on Chain Broadcasting of May 2, 1941 (at pages 26 to 28) as of that date. Mutual has outstanding a total of 99 shares of common stock (out of an authorized total of 500 shares of common stock, there being no other class of stock), held by seven stockholders, each of whom (with the exception of Colonial, noted below) directly owns and operates one or more broadcast stations, and two of whom (Colonial and Don Lee) operate regional networks, as follows:

[fol. 349]

Shareholder	Number of Shares	Call Letters of Station or Stations	Location of Station
WGN, Inc	25	WGN	Chicago, Ill.
Bamberger Broadcasting Service, Inc.	25	WOR	New York, N. Y.
Don Lee Broadcasting Co.	25	KHJ	Los Angeles, Cal.
		KFRC	San Francisco, Cal.
		KGB	San Diego, Cal.
		KDB	Santa Barbara, Cal.
Colonial Network, Inc.*	6	WAAB	Boston, Mass.
		WNAC	Boston, Mass.
		WEAN	Providence, R. I.
		WICC	Bridgeport, Conn.
United Broadcasting Co.	6	WHK	Cleveland, O.
		WCLE	Cleveland, O.
		WHKC	Columbus, O.
Cincinnati Times-Star Co.	6	WKRC	Cincinnati, O.
Western Ontario Broadcasting Co., Ltd.	6	CKLW	Windsor, Canada (in the Detroit area)

*Colonial Network, Inc., is not the licensee of the four stations set opposite its name. The licensee of these stations is Yankee Network, Inc., a corporation owned by th[illegible] me interests.

Steps have been taken as a result of which one or more of four of the foregoing (Colonial, United, Western Ontario, and Cincinnati Times-Star) may have their shareholdings increased from 6 shares to 25 shares each (the matter being at present in process of negotiation and study), and four other concerns will or may be added to the list of shareholders, with either 6 shares or 25 shares each, owning and operating broadcast stations affiliated with Mutual as follows:

Prospective Shareholder	Call Letters of Station or Stations	Location of Station
Pennsylvania Broadcasting Co.	WIP	Philadelphia, Pa.
WCAE, Inc.	WCAE	Pittsburgh, Pa.
Baltimore Radio Show, Inc.	WFBR	Baltimore, Md.
Buffalo Broadcasting Corporation	WGR	Buffalo, N. Y.

Mutual has a Board of Directors with nine members, based on representation of the shareholders in proportion to their shareholdings, and also including affiant. Pursuant to its cooperative purposes and character, and to insure a fair representation of the interests and points of view of its shareholders and affiliates, as well as of the various communities and sections of the United States, Mutual, in addition to the representation of its shareholders on its Board of Directors, maintains an Operating Board composed of rep- [fol. 350] resentatives of all its present and prospective shareholders and also two representatives of affiliates other than shareholders.

2. *Sources of revenue.* Mutual's expenses of operation are met through funds derived (a) from commissions retained by Mutual out of sums received from advertisers and others for use of time over the stations constituting the Mutual network, together with specific contributions from shareholders and affiliates for wire-line expenses, and (b) from contributions from Mutual's shareholders fixed in accordance with contracts between them and Mutual.

III

Mutual Network Operations

1. *General scope and character.* Like its older competitors, National and Columbia, Mutual is engaged in the operation, and in performing all the functions, of a national

network organization, both within the definition accepted by the Commission in its Report and within the definition generally accepted in the industry and according to popular usage. Like said competitors, Mutual is engaged in supplying a daily network program service consisting of both commercial and sustaining programs, totalling over 112 hours a week over a system of telephone wire-lines to broadcast stations scattered over a large part of the United States. In addition, this program service is supplied continuously to one station in Canada, is made available, and to a substantial extent is used by, many other stations in Canada, and in part, is supplied to stations in Hawaii by radio.

2. *Broadcast stations affiliated with Mutual.* Beginning in the fall of 1934 with an association of four broadcast stations located in New York, Chicago, Detroit, and Cincinnati, and expanding by gradual steps into a network of national scope and character, Mutual now has (as of November 1, 1941) a total of 190 brodacast stations in the United States, Canada, Alaska and Hawaii. A correct list of these stations, together with data as to the power, frequency and hours of operation of the stations, the cities in which they are located and the population thereof, and their primary affiliations, if any, with National and Columbia, appears in [fol. 351] Appendix A, attached hereto. This total includes stations owned by its shareholders, stations affiliated with certain regional networks which in turn are either shareholders of Mutual or are affiliated with it, and other independently-owned stations not falling within either classification. While the list of affiliated stations appears large, actually, in terms of effective use as outlets for network programs, the network is under severe handicaps. These are due primarily to the fact that, as hereafter more fully appears, the restrictive provisions in the contracts between National and Columbia, condemned in the Commission's Report and forbidden by the Regulations now under review, completely bar Mutual from many important cities and markets, and entirely or largely bar Mutual during the more desirable broadcasting hours from many other important cities and markets, or make Mutual's access thereto subject to such conditions and uncertainties as to burden it with a heavy competitive disadvantage. In addition, as appears in Appendix A, Mutual's list of affiliated

stations contains relatively few stations of high or medium power with large coverage; it is largely made up of stations of low power and limited coverage. Many of them are in smaller cities which Mutual's competitors have passed over. In a number of instances groups of several such stations are necessary to furnish coverage even partially approaching that of single stations of larger power affiliated with either of said competitors. Appendix B, attached hereto, contains a comparison of the stations affiliated with each of the four national networks in these respects.

3. *Wire-lines for transmission of network programs.* Like its said competitors, Mutual maintains an extensive and virtually nationwide system of telephone wire-lines suitable and continuously available for the transmission of network programs from the places of origination to the stations constituting the network, the total mileage of said circuits being approximately 15,000 miles, at an annual cost of $1,200,000. These wire-lines are, for the most part, leased directly from the telephone company by Mutual but, in some instances, are secured by virtue of arrangements between Mutual and certain of its shareholders and affiliates who, in turn, lease the wire-lines from the telephone company. Mutual's wire-line system compares favorably with the wire-line systems of National and Columbia in mileage [fol. 352] and costs [1] and, to the extent that it is less, it is due somewhat to the fact that Mutual is a younger network but more to the effect of the restrictive provisions in the National and Columbia contracts barring Mutual from many communities and regions. In addition to its regular wire-line system, whenever necessary or desirable, Mutual arranges for additional circuits on a temporary basis to supply to the network programs originating at points not on the network, and similarly for transmission by radio or wire to the United States of programs originating in foreign countries for use over its network.

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[1] According to Trammell's affidavit, page 13, "NBC's wireline expenses in 1940 aggregated in excess of $3,600,000" for *two* national networks. According to Paley's affidavit, page 9, the cost is "over $2,000,000 a year." Both these figures apparently include the cost of special, local, occasional or temporary lines in addition to those used regularly as part of the network systems.

4. *Mutual's network program service—general.* Like its said competitors, Mutual supplies a network program service, consisting of both commercial and sustaining programs, to its affiliated stations. This service averages not less than 16 hours daily or a total of over 112 hours weekly. Frequently, additional hours of program service are supplied, including, on some occasions, service throughout the entire 24 hours of the day for the covering of events of major importance. The network program service thus supplied by Mutual is substantially the same in continuous character, content, quantity, quality, and expense of production as the network program services supplied by National and Columbia to their respective affiliates, differing only as (but not to the extent that) would be naturally expected of a younger organization having a smaller volume of business and suffering from the competitive handicaps imposed by National and Columbia's restrictive contracts.

5. *Commercial network programs.* Like its said competitors, Mutual is engaged in selling time on the stations constituting its network to advertisers, usually through advertising agencies (in most instances through a sales organization maintained by Mutual but, in some instances, through sales organizations maintained by its shareholders [fol. 353] or affiliates), for commercial network programs, to be supplied over the Mutual telephone wire-line circuits to as many of the stations as the advertiser can be persuaded to pay for. Because Mutual is a younger network, and more particularly because of the obstacles created by National's and Columbia's restrictive contracts, Mutual has not been able to, and does not provide, as great a volume of commercial network programs to its affiliated stations as do its said competitors, but there is otherwise no substantial difference in the commercial network program service supplied by Mutual and that supplied by its said competitors. As is the case with the latter, and in substantially the same manner, most of Mutual's commercial network programs are largely produced and paid for by the advertising agency and not by the network organization. Those not so produced are, in the case of Mutual, produced principally at the stations and by the staffs and facilities of Mutual's shareholders, chiefly at New York, Chicago, and Los Angeles, in substantially the same manner, and

with the same results, quality, and effects, as those produced at the so-called key stations of said competitors.

6. *Sustaining network programs.* Like its said competitors, Mutual is engaged in supplying a sustaining program service to its affiliated stations during hours not occupied by commercial network programs. This sustaining program service exceeds 84 hours weekly and consists, in general, of the same character of cultural, educational, religious and public service programs as those supplied by its said competitors, and differs only in that (1) because of its smaller volume of commercial network programs Mutual furnishes a greater volume of sustaining network programs in terms of hours per week than do its competitors, and (2) because, with certain exceptions (consisting principally of broadcasts of news and special events originating in foreign countries), such sustaining programs are produced not by Mutual as a corporate entity but by its shareholders and affiliates, principally those at New York, Chicago and Los Angeles, but also, to a substantial extent, by its shareholders and affiliates elsewhere. The selection of sustaining programs to be supplied to the network is made by Mutual through a competent staff by choosing the best from all such programs broadcast or proposed to be broadcast by its shareholders and affiliates. The actual annual [fol. 354] cost of production of such sustaining programs compares favorably with the sustaining program costs of National and Columbia.[2] In the production of sustaining programs, the studios, staffs and equipment of Mutual's principal shareholders serve substantially the same pur-

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[2] According to Trammell's affidavit, page 15, National's *two* national networks, the Red and the Blue, "required the expenditure of more than $3,000,000 for talent and material alone." According to Paley's affidavit (p. 10) "In 1940 alone, CBS expended in excess of $5,000,000 on sustaining programs." This latter figure, however, includes an arbitrary allocation of Columbia's overhead, administrative expenses, wire-line rentals, etc. The cost of producing simply those of Mutual's sustaining programs (in terms of talent and material alone) which originate at WOR, New York, WGN, Chicago, and KHJ, Los Angeles, exceeds $1,250,000 annually and, when the cost of sustaining programs at other points is added, substantially exceeds this figure.

poses and perform substantially the same functions as the socalled key stations of its competitors.[3] The Mutual method of supplying sustaining programs has several recognized and demonstrated advantages in that (1) it encourages shareholders and affiliates, with stations in many parts of the country, to produce good sustaining programs in the expectation that they will be accepted on the network and broadcast to a nation-wide audience, with appropriate credit in each instance to the station and the locality originating the program, instead of having the function of providing sustaining programs appropriated entirely by the network organizations,[4] (2) through the Mutual system of compensation to stations hereinafter described, funds are provided to shareholders and affiliates for this purpose instead of being retained by the network corporation,[5] (3) [fol. 355] the public is provided with a highly desirable diversity of points of program origination, and (4) the tendency toward undue concentration of talent and facilities for the production of programs in two or three large cities is materially neutralized. The excellent and varied character of Mutual's sustaining program service, provided in this manner, appears from the listings of regular sustaining features supplied over its networks and by the fact that in several instances where a station is or has been affiliated with both National's Blue Network and the Mutual network, the affiliate has frequently taken more hours of the Mutual sustaining service than it has of National's sustaining service. Statements and insinuations disparaging either the quantity or quality of this service, such as those appearing in Mr. Paley's affidavit (at pages 6-8, 29-30) and Mr. Trammell's affidavit (at page 7), are simply contrary to well-known or easily ascertainable facts.

7. *Ownership of stations, studio facilities, etc.* Unlike its said competitors, Mutual, as such, does not own or

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[3] It is to be noted that at one of the principal points of program production, Los Angeles, National does not own or operate any station.

[4] Mutual's programs originate at an average of not less than 18 different cities each week (Transcript of Record p. 5267).

[5] As stated in Paley's affidavit (p. 5), "The quality of sustaining programs can be improved by the individual station when its revenues from advertising increase."

operate any broadcast station. As appears from what has already been stated, however, the broadcast stations of certain of its shareholders, principally those in New York, Chicago, and Los Angeles, but to some extent also the broadcast stations of the other shareholders and of certain of Mutual's affiliates (including its affiliate WOL at Washington, D. C.) serve substantially the same purposes and perform substantially the same functions as the so-called key stations of National and Columbia,[6] so far as they are either necessary or desirable for successful network operation. The stations which serve such purposes for Mutual have elaborate studios in buildings specially built or [fol. 356] adapted for the purpose, maintain competent engineering staffs, and maintain ample facilities for the production of programs, which compare favorably to those of National's and Columbia's so-called key stations, and in some instances and in some respects, are superior thereto. Charges such as those made in Mr. Paley's affidavit (pp. 7-8, 30), that

> "Mutual has no studios, maintains no engineering department, neither owns nor maintains any facilities for the production of programs and does not originate or produce a network program service such as is maintained by CBS and NBC"

apply only to Mutual as a separate corporate entity and are distinctly untrue of Mutual in its operation as a network.

8. *Basis of compensation to stations.* Unlike its competitors, Mutual has not attempted, and does not attempt, to fix, by contract or otherwise, the rates to be charged

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[6] It is to be noted, for example, that National does not own or operate a station at one of the principal production points, i. e., Los Angeles, and that National and Columbia each own and operate stations at cities in which the other does not own or operate a station (e.g., at Cleveland, St. Louis, Minneapolis, Charlotte, Denver, and San Francisco). It is to be also noted that, at each of their stations, including the so-called key stations, both National and Columbia sell substantial amounts of time for local or national spot commercial programs and, in the periods thus sold, do not broadcast their excellent sustaining programs.

advertisers and others for the use of time over stations constituting its network. The rates charged by Mutual are simply the sum total of the rates of the stations used, save only in the case of certain volume discounts, but even in such case the discounts are also based on the stations' rates. Of the sums received from advertisers and others, Mutual retains a commission determined in advance by contract between it and the affiliate which in the normal case is either large enough ~~to include~~, or is supplemented by, the affiliate's share of the cost of wire-lines to connect it with the Mutual system, and, in the case of shareholders, Mutual also retains each shareholder's agreed contribution toward its expenses of operation. Because of this basis of compensation, Mutual, on the whole, pays to its affiliates a larger proportion of the sums received from advertisers for the use of the affiliates' stations than is paid by National and Columbia, although, because of its smaller total volume of business, the actual total sum paid to its affiliates is; in most instances, less.

9. *Mutual's contracts with affiliates.* Prior to February 1, 1940, Mutual's contracts with its affiliates (with the exception of a net work exclusivity provision with one shareholder and territorial exclusivity provisions with the same shareholder and a few affiliates) did not contain provi- [fol. 357] sions contravening the Commission's Regulations, either in their original form as adopted May 2, 1941, or as amended October 11, 1941. Since February 1, 1940, as is more particularly set forth in the Commission's Report (see particularly pages 35-37) and for the reasons therein stated, Mutual's contracts with its shareholders, its prospective shareholders, and one or two of its other affiliates have contained provisions of exclusivity and of exclusive time-options (from 3¼ to 4¼ specified hours on week days and 6 hours on Sundays) which contravene said Regulations, but the contracts provide that these clauses shall lapse if the Commission prohibits them, or if the other national networks voluntarily abandon them and, at the time the contracts were entered into, Mutual advised the ~~Commission of the~~ fact, of the reasons therefor, and of its willingness and desire to abandon them in the event such Regulations should be adopted. Immediately after the Commission's order of May 2, 1941, Mutual prepared a contract to conform with the Regulations in their origi-

nal form and, on submission thereof to the Commission, secured the Commission's informal approval on June 19, 1941. A copy of this contract appears in the printed Hearings on S. Res. 113 at pages 565-9. Had it not been for the delays thereafter in putting the Regulations into effect, this contract would have been forthwith submitted by Mutual to all its shareholders and affiliates and, as affiant is informed and believes, would have been executed by them and would now be in full force and effect. Among the provisions of the contract, thus informally approved by the Commission, were the following:

"2. Mutual and the Broadcaster will each publicize the Station as the regular Mutual outlet in the city in which the station is located. The station shall have the right to the first call on Mutual network commercial and sustaining programs in said city and Mutual shall not offer any series of programs or single program (not a part of a series) to any other radio station located in said city unless said series of programs or single program has been offered to the Broadcaster for broadcasting through the Station under this contract and the Broadcaster shall have failed or refused to accept such program or programs within forty-eight (48) hours after Mutual's offer. In the [fol. 358] case of a commercial program or a series of commercial programs:

"(a) If the Broadcaster is unable to clear the required period or periods of time on the station for such program or programs but notifies Mutual within said 48 hours that the Broadcaster can clear a mutually satisfactory substitute period or periods and is able and willing to broadcast the program or programs by means of the off-the-line recordings (made by the Broadcaster without cost to Mutual or the advertiser) during such substitute period or periods. Mutual will accept such substitute period or periods, unless the advertiser is unwilling to accept such broadcasting by the Station by means of off-the-line recordings during such substitute period or periods, it being understood that Mutual is not obligated to requirg the advertiser to accept such delayed broadcasting; and

"(b) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs scheduled to run for 13 weeks or more, or a series of separable

programs, but notifies Mutual within said 48 hours that the Broadcaster will clear said periods of time upon a specified date not later than four (4) weeks after the commencement of the series of programs, Mutual will contract for such periods of time on the Station as of the specified date upon which the Broadcaster is able to clear such periods, unless the advertiser refuses to accept such postponement of broadcasting on the station.

"If the Broadcaster fails or refuses to accept said program or programs or if the Broadcaster is unable to clear the required period or periods of time and Mutual is unable to persuade the advertiser to use a substitute period or periods or to postpone the commencement of such programs on the Station, as provided in the preceding subparagraph, Mutual may contract with any other station located in said city for the broadcasting of said commercial program or programs. In the case of a single sustaining program or series of sustaining programs:

(a) If the Broadcaster is unable to clear the required period or periods of time for such program or programs but notifies Mutual that the Broadcaster will broadcast the program or programs by transcription at a mutually satisfactory substitute period or periods, Mutual will not offer [fol. 359] said program or programs to any other station in said city; and

"(b) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs, Mutual, in offering said series of programs to any other station in said city, will offer said series subject to recapture by the Station on one (1) week's notice to Mutual. It is understood, however, that notwithstanding the foregoing, Mutual may make available to any other station in said city special sustaining programs of great public importance (such as, but not limited to, addresses of the President of the United States.)"

On October 31, 1941, affiant sent to each of Mutual's shareholders and prospective shareholders a letter, a copy of which is attached hereto as Appendix C, and an informal interim agreement, a copy of which is attached hereto as Appendix D. The last-mentioned agreement was assented to by all of its said shareholders and prospective shareholders and Mutual is now operating thereunder without experiencing any difficulty or inconvenience by reason of

any provision based on, or required by, the Regulations. Shortly thereafter, Mutual completed preparation of another contract to conform to the amended Regulations of October 11, 1941, a copy of which is attached hereto as Appendix E. Had it not been for subsequent delays in the effective date of the amended Regulations, due to the motions of plaintiffs now under consideration and to the stipulation between plaintiffs and the Commission, this contract would already have been submitted to Mutual's shareholders and affiliates and, as affiant is informed and believes, would have been executed by them and would now be in full force and effect.

IV

Mutual's Attempts to Secure Interim Relief in the Proceedings Before the Commission

1. *Initiation of the proceedings.* As stated in the Commission's Report (page 1), the proceedings before the Commission commenced with the Commission's Order No. 37, adopted March 18, 1938. Neither Mutual, nor, so far as is known to affiant, any officer, employee or representative of Mutual had made any complaint to the Commission [fol. 360] on the subject-matter of the proceedings, or had taken any step which led or had any part in leading the Commission to initiate the proceedings.

2. *Participation in the hearing.* As was the case of its competitors, pursuant to notice by, and request from, the Commission, Mutual entered its appearance and thereafter presented evidence before the Committee in charge of the hearing. Its witnesses (including affiant), to the best of their ability, produced the facts and information called for by the Commission's notice or requested by its counsel. The evidence presented in behalf of Mutual appears principally at pages 4845 to 5428 (February 7 to 14, 1939) and pages 8249 to 8298 (April 18, 1939) of the transcript of record, and in Exhibits Nos. 368 to 435. The hearing extended from November 14, 1938 to May 19, 1939.

3. *Mutual's motion of April 19, 1939.* The injuries to Mutual and its affiliated stations resulting from the restrictive contracts of National and Columbia having steadily persisted and increased during the course of the hearing, and the threatened future injuries appearing likely to become

greatly aggravated through the increasing activities of National and Columbia (both of which organizations were, in apparent defiance and attempted nullification of the Commission's power and jurisdiction, busily engaged in attempting to secure long-term renewals of their restrictive contracts with affiliates), Mutual, on April 19, 1939, sought interim relief from the Commission through a motion the nature of which, and the arguments presented in support and in opposition, appear at pages 8454-8463 of the transcript of record. In substance, the motion sought the immediate adoption by the Commission of a regulation which would have forbidden licensees to enter into affiliation contracts with network organizations, or into any renewal or extension of existing affiliation contracts, for a period extending beyond December 31, 1940, at least in cities having less than four stations with comparable facilities (R. 8457, 8459). The motion was taken under advisement by the Committee (R. 8463).

4. *Renewal of the motion in July, 1939.* No action having been taken on said motion, on July 6, 1939 Mutual filed a formal motion in writing asking that the Committee recommend to the Commission at an early date the adoption of a regulation in substance as follows:

[fol. 361] "No licensee of a standard broadcast station shall enter into a contract, agreement or other arrangement with any network organization covering or dealing with the affiliation of such licensee's station with the network organization, or into any renewal or extension of any such existing contract, agreement or other arrangement, or exercise any option or other privilege contained in any such existing contract, agreement, or other arrangement for renewal or extension thereof, for a period extending beyond * * *",

suggesting that the date to be specified in the foregoing be such as to allow sufficient time for the conclusion of the proceedings and the issuance of such regulations as might result therefrom. On July 14, 1939, Mutual filed a supplement to said motion incorporating facts and events occurring since the filing of the motion. As appears in greater detail in said motion and supplement as contained in the record, National was in the process of obtaining, and did obtain, an exclusive and time-option contract with respect

to WLW, a 50 kw. clear channel station which had theretofore been free of such restrictions and had been Mutual's affiliate in Cincinnati and one of its basic and most important outlets. Mutual was thereafter completely excluded from said station. The contract was secured by National, as affiant is informed and believes, with the primary intent and purpose of crippling Mutual as a competitor[7] by depriving it of access to one of its most important outlets. No action on said motion or supplement was taken by either the Committee or the Commission.

5. *Renewal of the motion on July 17, 1940.* The Committee having made its report to the Commission on June 12, 1940, and the injuries to Mutual resulting from the restrictive contracts having persisted and increased, Mutual renewed its motion formally and in writing on July 17, 1940, as appears more fully from the record. No action, however, was taken by the Commission on the motion further than to announce in a release issued July 26, 1940 that the [fol. 362] advisability of adopting the temporary regulation requested by Mutual was one of the subjects to which briefs should be directed. No temporary or interim relief having been granted to Mutual, the Commission on May 2, 1941, over 3 years after initiating the proceedings, adopted the Regulations which, as later amended on October 11, 1941, are now sought to be further delayed from going into force and effect.

V

Irreparable Injury to Mutual Through Maintenance of Restrictive Contracts

1. *The contract provisions involved.* The provisions in contracts between National and Columbia and their respective affiliates which have caused, are now causing, and will cause great and, affiant believes, irreparable injury to Mutual are those forbidden by Regulations 3.101 and 3.104 of the Commission, as amended, and, to an incidental but nonetheless important extent, those forbidden by Regulation

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[7] Thereafter, after sale by Columbia of a station (WKRC3, theretofore owned and operated by it in Cincinnati, to Cincinnati Times-Star Co., Mutual obtained an outlet in that city.

3.103. These contract provisions, generally described, consist in

a) provisions by which the affiliate agrees not to broadcast the programs of any other network organization;[8]

b) provisions by which the affiliate grants to the network organization an exclusive option, exercisable on 28 days' [fol. 363] notice, either on all its hours of operation,[9] or on its more desirable hours in the morning, afternoon, and evening periods;[10] and

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[8] Such provisions are contained in virtually all contracts between Columbia and its affiliates and, at least until recently, have been contained in contracts between National and some 35 of its affiliates. From the fact, however, that all mention of the exclusivity clause is omitted from National's complaint (see par. 21 at p. 7 of the Complaint), that the form of affiliation contract attached to the Complaint as Exhibit A contains no such clause, and from the omission of Trammell's affidavit to mention or to justify such a clause, affiant is led to believe that National has abandoned the exclusivity feature. Affiant is informed that on or about December 4, 1941, National advised its affiliates that it has abandoned this feature of its contracts.

[9] Such provisions are contained in contracts between National and not less than 30 affiliates in the western part of the United States, including the Pacific Coast, and in contracts between Columbia and virtually all its affiliates. Beginning about 1937 Columbia has introduced an apparent limitation in its contracts which has since then been extended to most of them, namely, that the total amount of time per week upon which Columbia may exercise its option shall not exceed 50 "converted" hours (the equivalent of approximately 79 clock hours in actual practice, since 2 daytime hours are deemed the equivalent of one evening hour). Since the hours under option are not specified, however, the Columbia provision is the equivalent of an option on *all* the station's time until the maximum is reached.

[10] Such provisions are contained in practically all the remaining contracts between National and its affiliates, and cover the hours from 10 a. m. to 12 noon, from 3 p. m. to 6 p. m., from 7 p. m. to 7:30 p. m., and from 8 p. m. to 11 p. m.

c) provisions by which the term of such contracts is fixed at a period of 5 years or more.[11]

in addition, the ownership by National and Columbia of broadcast stations in certain communities, more particularly in *two communities served by less than four full-time* broadcast stations (covered by Regulation 3.106) has had the same restrictive effect, but, in order not to complicate the dicussion, such ownership will not be separately treated in this affidavit.

2. *The limited number of broadcast stations in many cities.* While there are, as of November 1, 1941, 877 broadcast stations in licensed operation in the United States,[12] many of these stations are wholly or partly unsuitable or unavailable as network outlets, because of their non-commercial character, or because of restrictions on their hours [fol. 364] of operation (e. g., stations required to close down at sunset or shortly thereafter), or because of inadequate coverage to serve the cities in which they are located (due to low power or undesirable frequency or interference), or because they are located in towns which are too small to be attractive to advertisers or are within areas served by four or more stations. There are only approximately 21 cities adequately served by 4 or more full-time broadcast stations. Of the remaining cities, approximately 24 are adequately served by 3 full-time broadcast stations; 59 are adequately served by 2 full-time broadcast stations; and, of cities having a population over 50,000, 44 are adequately served by only one full-time broadcast station. A list of cities classified according to the number of full time stations located therein and also according to the number of full time stations from which such cities receive adequate service is set forth in Appendix F, attached hereto. Many of the cities adequately served by only 3 full-time stations, some of the cities adequately served by only 2 full-time stations, and a few of the cities adequately served by only 1 full-time station, are of large or substantial population, or are the centers of recognized trade areas, constituting attractive markets for national advertisers. Because of

[11] This is true of nearly all contracts between National and Columbia and their respective affiliates.

[12] In addition, as of November 1, 1941, construction permits were outstanding for 38 new stations.

technical reasons having to do with the limited frequencies available for use by broadcast stations, and limitations on the extent to which two or more stations can operate simultaneously on the same or adjacent frequencies without undue interference, it is, generally speaking, impossible in the present or any immediately foreseeable future state of the art to provide additional full-time stations in such cities.

3. *Effect of contract provisions on network access to markets.* With four national networks in operation, the effect of the contract provisions above described is that in any city having less than four full-time stations, one (or more) of the networks is either entirely or largely barred from access for its program service to the city and its environs, and from offering coverage of the city and its environs to any national advertiser, depending on the type of restrictive provisions in effect with respect to the stations serving such city. Similarly, the listening public in any such city is either entirely or largely barred from access to the program services of such network or networks. [fol. 365] In actual practice, under existing contracts, there are 7 cities (shown in Appendix F) adequately served by only 3 full-time stations in which Mutual's only access is through stations primarily affiliated with National under contracts which, while not containing the exclusivity feature, contain option-time provisions covering most of the station's more desirable hours.[13] In such cities, Mutual's only access has been (a) to the less desirable hours not covered by option, or (b) to the hours covered by option not in actual present use by the network having the option but subject to use by that network on 28 days' notice. In 23 cities served by only 2 full-time stations (shown in Appendix F), Mutual is effectively and as a practical matter denied access because of the restrictive provisions, and in 9 other such cities (likewise shown in Appendix F) Mutual's only access is subject to option-time provisions in favor of its competitors. For the most part, the cities and towns having only 1 full-time station rendering adequate coverage are smaller in population and are less important as markets, but they nevertheless include a fairly large number of important centres from which Mutual is completely barred.

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[13] See footnote 10 above.

4. *The national advertiser's interest in access to markets.* The commercial use of networks of national scope (such as those of National, Columbia, and Mutual) for sponsored programs is by national advertisers, that is, concerns having or desiring markets for their products or services generally throughout all or most of the country, and therefore interested in having their programs heard by as large a portion of the public as is possible, consistently with the amount of money available to them for radio advertising and the probable return therefront. This interest naturally centers first on the larger cities, which, because of concentrations of population not only within their corporate limits but also in their environs and in the trade areas tributary to them, generally provide the larger audiences per station and are vital to any national advertising campaign. The interest extends, however, to medium-sized and, progressively, to smaller cities and their respective trade areas, until a point is reached where the prospective audience may be too small, in proportion to the outlay and prospective [fol. 366] return, to attract the advertiser. It has been the experience of all networks (including Mutual), however, that as a sponsored program gains an audience in the larger markets and demonstrates its value to the advertiser, the advertiser seeks to extend the program to other and smaller markets, over a larger network of stations, and over a larger portion of the country. Thus, sponsored programs which at the outset were broadcast over comparatively few stations in the larger cities and in only a portion of the country's area have almost regularly been extended so as to be broadcast over a nation-wide network. In addition to the foregoing, there are national advertisers who, because of the location of their dealers, distributors, jobbers, sales organizations, or retail stores, or because of regional differences in habits and in demand for particular products or services, or because of the advertising campaigns of competitors, require access to certain but not all of the smaller markets in addition to the larger markets.

5. *The national advertiser's interest in continuity of his sponsored program.* Contracts between network organizations and advertisers (usually through advertising agencies) for the use of a network of stations for the broadcasting of a sponsored program are customarily for a period of 52 weeks, cancellable at the end of any 13 weeks' period.

It is the experience of all networks (including Mutual) that if use of the network has given satisfactory results and the advertiser's needs and desires with respect to continuous service and expansion are met, the great majority of such contracts are renewed from year to year for use of the same network on the same day and at the same hour with the same, or an improved, character of program. A vital and usually determinative factor, however, in persuading an advertiser to enter such a contract with a particular network organization in the first instance, or to continue with and to renew such a contract thereafter, is the ability of the network organization to assure the advertiser of continued and uninterrupted regular broadcasting of his program over the stations which the advertiser has agreed to use, for the period of the contract and on the day and at the hour selected by the advertiser. The reasons for the importance of this factor include the following:

a) Most sponsored network programs entail large expenditures by the advertiser for talent and material used [fol. 367] in the production of such programs. This is made possible by the fact that, through the use of wire-line systems, the same program can be transmitted for simultaneous broadcasting to the audiences of many stations, and therefore to a much larger public, with a correspondingly greater return to the advertiser, without any increase in the cost of producing the program. The loss of audience resulting from unavailability of access to a desired market, or from discontinuance of the program by any station on the network in such a market, means a corresponding diminution in the return to the advertiser for his outlay.

b) Any sponsored network program requires a substantial period of time (usually not less than eight weeks and frequently longer) before it acquires a regular audience and a goodwill with the public served by a particular station of a character satisfactory to the advertiser, and, once it has acquired such an audience and goodwill (which, in the case of any good program, increases with the length of the period of time during which the program is broadcast), the advertiser has a considerable investment therein which is lost if the station becomes unavailable and the advertiser is deprived of access to the market.

c) When a new network commercial program is about to be broadcast, or is being broadcast, it is the practice

of the advertiser sponsoring the program to make large expenditures for promotional advertising in newspapers and other media to attract public attention to the program, and to take appropriate steps to inform his dealers, distributors, jobbers, sales organizations or retail stores in each community about the program and enlist their cooperation in promoting public interest therein by advertising and other means. The advertiser has a considerable investment resulting from such expenditures in each community, which is lost if the station in that community becomes unavailable and the advertiser is deprived of access to the market.

d) Most network commercial programs have a continuous and connected character, frequently having a nature and importance corresponding to that of instalments in a serial story, or of sequels. In addition, a vital feature of successful radio advertising is consistent repetition at regular and scheduled intervals, known to and expected by the [fol. 368] public. Much of the value of such programs to the advertiser is in preserving a regular audience for such programs against interruption or discontinuance thereof, and against shifts in the day and hour for which they are scheduled. Particular hours in the day are more important to the advertiser than other hours, either because (as in the case of certain evening hours, such as 8 p. m. to 10:30 p. m.) there is a greater potential audience, or because some hours are more appropriate for a given type of program than other hours. Ordinarily, the advertiser has, at the outset, selected the best hours available for his purposes. If, by reason of a station's becoming unavailable at the scheduled hour, the advertiser is compelled to shift his program to another hour on the same station, he suffers serious disadvantages and loss of return on his expenditures because (1) the audience built up for the scheduled hour is dislocated and is temporarily and, to some extent, permanently lost (not infrequently to a competitor), and a new audience must be built up, with corresponding expenditures for promotion; (2) the hour to which the program is shifted (sometimes to the next day) is usually less desirable with respect to potential audiences, or appropriateness for the program, or timeliness, and may, in turn, likewise be subject to further shifting and repetition of the same experience; (3) when such shifts occur, the broadcasting of the program

over the station involved must be done by transcription and, under the regulations of the Federal Communications Commission, must be announced as such, with a consequent and very real loss in the effectiveness of the program with the public as against a broadcasting of the program instantaneously at the time of performance by live talent; (4) the network commercial programs of one or more competitors of the advertiser may, and frequently are, being broadcast over other stations (or the same station) in the same market without being subject to these disadvantages.

6. *Factors necessary to assure equal competitive opportunity for national networks.* In order to have equal opportunity in securing commercial network programs from national advertisers, a national network organization must be able to offer, on a footing substantially equal to that of its competitors, (a) access to the markets desired by such advertisers, and (b) assurance of the continued broadcasting [fol. 369] of the advertisers' programs at the desired and scheduled time in such markets.[14] Inability in either respect necessarily results in a preference for, and a choice by, national advertisers of other national network organizations not thus handicapped, both in originally placing their business and in continuing business already placed, even though in all other respects such advertisers may prefer the handicapped organization on its merits. Many cities are of such importance (including a number of cities adequately served by less than four full-time stations, from access to which Mutual is either completely barred, or is barred on a continuous basis during the more desirable hours, by the restrictive contracts of National and Columbia, as shown in Appendix F) that the inability of one network and the ability of a competing network to afford access thereto on a continuous basis to a single such city will usually deter-

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[14] As stated by Mr. Paley in his affidavit (pages 12-13):

"Nor will the advertiser embark upon the costly venture of a nationwide radio program series unless the relations between the network he selects and its affiliated stations are sufficiently stable so that he may reasonably expect to maintain his coverage and enjoy the cumulative fruits of his efforts to please the listening public and promote sales of his product."

mine the choice of the advertiser. Other cities (including a large number adequately served by less than four full-time stations, from which Mutual is either wholly or largely barred as aforesaid) are of sufficient importance so that, while such access to a single such city may not determine the advertiser's choice, access to two, three or a larger number of such cities, depending on their importance and their appeal to the particular advertiser, will determine his choice. The choice by an advertiser of one network over another for such reasons results in loss of revenue for the latter network and its affiliates not only with respect to the markets to which the losing network does not have such access but also with respect to all other markets in which it does have such access, as well as a loss of prestige with both advertisers and advertising agencies. The handling and placing of nearly all national network advertising is controlled by a limited number of agencies. The appraisal and judgment of these agencies of the respective abilities [fol. 370] of competing networks to afford the desired continuous access to markets is frequently a determining factor in the choice of networks and, by reason of their great interest and their continuous and competitive activities in the field, such agencies are intimately familiar with the facts and circumstances bearing on such access in connection with each network. In addition, there are several trade journals wholly or largely devoted to the broadcasting industry, including *Broadcasting*, *Variety* and *Radio Daily*, which circulate among all advertising agencies and, to a large extent, among national and prospective national advertisers, which trade journals regularly report, as items of news interest to their readers, the acquisition or loss of business by any national network organization, and frequently the reasons therefor, with corresponding enhancement or impairment of the prestige of the network involved, and with corresponding effect on its ability to retain existing business and to obtain further business.

7. *Competitive use of such factors by National and Columbia in representations to agencies and advertisers.* At all times since shortly after the organization of the Mutual network, and particularly since it became a nation-wide network, National and Columbia, in competing with Mutual for the business of national advertisers, have made, and have caused their salesmen, representatives, and agents to

make, representations to advertising agencies and advertisers that, because of their contracts with affiliates in markets adequately served by less than four full-time stations, needed or desired by the advertiser,

a) Mutual is unable to provide any access at all in certain of such markets, either at the outset or in case of expansion;

b) Mutual is unable to provide access on an assured continuous basis in a number of other of such markets during the more desirable hours, or the hours usually needed or desired by the advertiser;

c) Any such access as Mutual can obtain for a network commercial program in the class of markets last mentioned during the more desirable hours, or the hours usually needed or desired by the advertiser, will be subject to discontinuance or to shift on 28 days' notice at the demand of National or Columbia (as the case may be), with the at- [fol. 371] tendant inconveniences, resorts to transcripts and less favorable hours, loss of investment and audience, and other disadvantages heretofore pointed out.[15]

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[15] In certain instances, examples of which are pointed out below, this representation has been accompanied by specific threats on the part of National's Blue Network that all, or an important part, of the precise time desired by the advertiser on stations in such markets would be preempted by National under its option-time privileges for another specified advertiser who was ready and willing to use the time for a network commercial program over the Blue Network. The cities in which are located stations jointly affiliated with National or Columbia and Mutual, but in which Mutual's access is subject to the restrictive contract provisions in favor of National or Columbia, are as follows:

Cleveland, O.	Harrisburg, Pa.
Houston, Texas	Binghamton, N. Y.
Memphis, Tenn.	Evansville, Ind.
Birmingham, Ala.	Manchester, N. H.
Omaha, Neb.	Augusta, Ga.
Richmond, Va.	Cedar Rapids, Iowa
Jacksonville, Fla.	Lancaster, Pa.
Des Moines, Iowa	Corpus Christi, Texas

In all but 3 instances, the stations in question are affiliated with National.

d) Advertisers who have used the Mutual network in the past have been subjected to such handicaps and disadvantages and, as a result, have left the Mutual network and have placed their business with National Columbia.

Such representations have caused, and are continuing to cause, Mutual to lose the business of national advertisers who have placed their business with National and Columbia and who, as affiant is informed and believes, would otherwise have placed their business with Mutual. The situation has arisen much more frequently in Mutual's competition [fol. 372] with National's Blue Network, than with National's Red Network or Columbia because National has been able to sell only a comparatively small amount of the time it has had under option over its Blue Network affiliated stations and such stations consequently have a much larger amount of time available during their more desirable hours for the programs of another network, and a much greater need for revenue and a corresponding desire and interest in having such use made of their time, than is true of most of the Red Network and Columbia affiliated stations. As is hereinafter set forth in detail National has, usually in the interest of its Blue Network, from time to time actually exercised its option-time privileges under its contracts with affiliates in markets such as those which have been described so as to force advertisers who were theretofore using the Mutual network to take their business and their programs from Mutual and to place them with National, either because the advertisers were blocked from further desired expansion for their programs, or because they were completely denied access to markets needed or desired by them, or because of naving to shift their programs to delayed broadcasts by transcription. The result has, on occasions, been simply that, with respect to such markets, the same advertiser with the same program would continue the use of the same sta-

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Salt Lake City, Utah	York, Pa.
Bridgeport, Conn.	Columbia, S. C.
Tulsa, Okla.	Bangor, Me.
Spokane, Wash.	Weslaco, Texas
Charlotte, N. C.	Shenandoah, Iowa

tions at the same hour, but to do so was forced in other markets to use National's Blue Network instead of the Mutual network. In addition to the representations above described, National, in order to induce advertisers to its Blue Network, (a) has given them the benefit of a system of large discounts made possible only by its very profitable operation of the Red Network, (b) has assured such advertisers that, if they will use the Blue Network, they will be given the benefit of the first opening of suitable time that develops on its Red Network, and (c) has given such advertisers the benefit of a combination of the better stations affiliated with both the Red and the Blue Networks, all of these being competitive advantages for National possible only because of its ownership and operation of two supposedly competing national networks.

8. *Representations with respect to effective date of the Commission's Regulations.* In addition to the representations summarized in the preceding paragraph, as affiant is informed and believes, National and Columbia are, and ever [fol. 373] since the Commission's Order of May 2, 1941, have been, making, and causing their salesmen, representatives and agents to make, representations to advertising agencies, to national advertisers, and to their affiliates, that, by reason of proceedings which they proposed to institute in court (including these pending proceedings), the Commission's Regulations would not go into effect in less than two or three years (if at all) and that during such period of time affiliates may safely enter into or renew contracts with National or Columbia containing provisions such as those forbidden by the Regulations, and national advertisers cannot place their business with Mutual without being subject to the hardships and inconveniences already described. As a result of such representations, coupled with the successful exercise by National of its option-time provisions within the past two months to its advantage and at the expense of Mutual, all as hereinafter more fully set forth, Mutual has lost business of vital importance to its continued success, and is immediately threatened with the loss of further such business, and, unless the Regulations are permitted to go into effect, affiant fears it will continue to lose such business to a point where its existence will be endangered.

9. *Current and past examples of loss of business by Mutual because of the restrictive contracts.* (a) *The Bal-*

lantine Program. In June, 1941, after extensive efforts and outlay, Mutual secured, and entered into, a contract with J. Walter Thompson Company, one of the leading advertising agencies, acting in behalf of its client, Ballantine & Sons, brewers of ale and beer, for the broadcasting of a network commercial program over 77 stations affiliated with Mutual at the scheduled hour 9:30 p. m. to 10 p. m. (New York City time) on Friday nights, for the usual period of 52 weeks, commencing in September, 1941, cancelable on four weeks' advance notice at the end of any 13-week cycle. The program which was proposed to be broadcast, and which was thereafter broadcast, was of outstanding audience appeal and was of a character and quality of excellence such as to contribute greatly to the prestige of Mutual and its affiliates, with a heavy cost of production for the advertiser and featuring popular and well-known artists and talent such as Charles Laughton, Milton Berle, Shirley Ross, and Bob Crosby's Orchestra.

Included among the 77 stations were 14 in cities adequately served by less than four full-time stations. All 14 [fol. 374] stations were (and are) affiliated with National under contracts containing network option-time clauses above described. The call letters, location and network affiliation (other than with Mutual) of these stations were and are as follows:

WHK	Cleveland	Blue Network
WTAG	Portland	Red "
WCSH	Worcester	Red "
WTIC	Hartford	Red "
WICC	Bridgeport	Blue "
WMFF	Plattsburg	Blue "
WGAL	Lancaster	Red and Blue Networks
WORK	York	Red and Blue "
WJHP	Jacksonville	Blue Network
WEAN	Providence	Blue "
WKBO	Harrisburg	Red and Blue "
WKAT	Miami	Blue Network
WLBZ	Bangor	Red and Blue "
WXYZ	Detroit	Blue Network

It was necessary for the 14 stations to accept the Ballantine program subject to the exercise by National of its privilege under the network option-time provisions to preempt the time on 28 days' notice.

On or about September 15, 1941, 10 of the 14 stations notified Mutual they could not continue to broadcast the Ballantine program after October 10, 1941, at the scheduled hour (namely, from 9:30 to 10:00 p. m. on Friday evenings) because that time was subject to option by National and National had exercised its option for the broadcasting of a program sponsored by the Canada Dry Company. The stations advised Mutual that on and after October 10, 1941 the program would have to be broadcast by them through the use of transcriptions at a later hour (meaning another day in most instances), which substitute time, to be satisfactory to the advertiser (that is, in equally desirable hours), would necessarily be at an hour likewise subject to preemption by National on exercise of its option privileges. National's action in exercising its option worked to the injury of the 10 affiliates in that not only did they have to accept a lower basis of compensation from National than from Mutual but the Canada Dry program was for 25 min- [fol. 375] utes instead of 30 minutes, thus further reducing their compensation.[16]

On October 23, 1941 Mutual was notified in writing by J. Walter Thompson Company that the agency was canceling the Ballantine program effective after the broadcast on October 31, 1941. A copy of this letter and enclosure is attached hereto as Appendix G. Since the contract was binding for a 13-week period ending December 5, 1941, the agency offered to compensate Mutual for time from October 31, 1941 to December 5, 1941, without making use of the Mutual network if Mutual would not release the agency from its obligation. The amount thus to be paid to Mutual was $27,711.75 for the five weeks involved, plus an additional $17,984.20, because of the inapplicability of the short rate, resulting from broadcasting only eight weeks instead of 52 weeks. This amount constituted approximately 16 per cent of the total amount that Ballantine would have been called upon to pay to Mutual under its contract for the 52-week period, and, in the absence of any rate concession

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[16] Affiant is informed and believes that the primary reason the Canada Dry Company scheduled its program with National rather than with Mutual was that Mutual could not assure continuous access to the markets served by these 14 stations at an hour acceptable to the advertiser, whereas National was in a position to do so.

made by National to the agency or the advertiser, is indicative of the value placed by them upon the continued and assured access which National was able to provide to the markets in question.

Prior to soliciting and procuring the Ballantine account, National had not accepted any beer or liquor advertising over either its Red or Blue Networks for several years, and had allowed it to be understood that it was its regular policy not to accept such advertising. To secure the Ballantine program, therefore, and to deprive Mutual thereof, National introduced a major change in its policy, at least for the Blue Network. On information and belief, affiant further states that, as an additional inducement to the advertising agency, National informed it that if Ballantine would make use of the Blue Network it would have the privilege of transferring to the Red Network as soon as time thereon should [fol. 376] become available and National should decide to accept such advertising on the Red Network.

On October 27, 1941, Mutual was advised by J. Walter Thompson Company, both orally and by letter, that the Ballantine program would continue over Mutual for the remainder of the 13-week period, thus rescinding the cancellation as of October 31, but canceling the program as of December 5, 1941. A copy of the letter and enclosure, both dated October 27, 1941, is attached hereto as Appendix H. Since that date the program has been discontinued on the Mutual network and has been broadcast over National's Blue Network. Mutual's loss of the program has entailed not only loss to it and to its affiliates of the very substantial revenue involved for the remainder of the original contract period and any renewals thereof which the agency and the advertiser might otherwise have agreed to, but also the loss of a very important and popular program and of the audience resulting therefrom, as well as a corresponding loss of prestige among advertising agencies, advertisers, and actual or prospective affiliates. To illustrate the wide publicity attendant upon such an occurrence, affiant refers to news items appearing in the trade magazine *Broadcasting* for October 27, 1941, at page 50, and in the trade magazine *Variety* for October 29, 1941, at pages 31 and 38, copies of which are set forth in Appendix I.

(b) *The March of Time Program.* In June, 1941, Mutual entered upon negotiations with Time, Inc., publishers of

Time Magazine, for the broadcasting over the Mutual network of a program known as "March of Time". This program had been formerly on the Columbia network, but had not been broadcast for some two years. Mutual was given to understand by the representatives of Time, Inc., that during the coming year the Mutual network would be used for the purpose. Thereupon, as affiant is informed and believes, officials of National proceeded directly to the representatives of Time, Inc., and told the latter, in substance, that if Time, Inc., placed its program on Mutual, National, through the exercise of its option privilege to preempt broadcasting time of affiliate stations, would see to it that the "March of Time" program would be either eliminated from stations in a number of important markets or, in the alternative, forced to delayed broadcasts by transcription. More specifically, as affiant is informed and believes, National's said officials represented that National had an order [fol. 377] from a concern known as the Clark Candy Company which could be applied to the precise half-hour in question (8.00 p. m. to 8:30 p. m. on Thursday nights) and that, after "March of Time" went to Mutual, the Clark Candy program would be used for the purpose of such elimination, but if the "March of Time" program would use National's Blue Network the Clark Candy program would be moved to, and scheduled on, the half-hour immediately following. As the result of said representations by National officials, Time, Inc., purchased time on the Blue Network of National and has been using said network since early in October, 1941, and the Clark Candy program has been scheduled for the half-hour immediately following. National's scheduling of the program for Time, Inc., represented a distinct change in its theretofore publicly an-ounced policy against dramatization of war scenes and impersonations of world figures, as well as its policy against the use of recordings on network programs. In illustration of the publicity attendant upon the change of policy, affiant refers to a reprint from the trade magazine *Broadcasting*, October 13, 1941, page 66, a copy of which is attached hereto as Appendix J.

(c) *The Lucky-Strike Program.* Approximately three years ago, Mutual secured the American Tobacco Company as sponsor for a regular weekly program advertising its product, Lucky Strike Cigarettes. The program was Kay

Kyser's "College of Musical Knowledge," and had been previously broadcast over the Mutual network as a sustaining program. Because of the popularity of the program and its satisfactory return to the advertiser after a period of about 13 weeks, the advertiser desired to expand the program to reach additional markets but, because of the restrictive contracts of National and Columbia, Mutual was unable to meet the advertiser's needs. The advertiser thereupon discontinued use of Mutual and placed the program on National, over which it is still being broadcast under the same name and with the same general character. For the same reason, the advertiser transferred a program "Melody Puzzles" from Mutual to National's Blue.

(d) *The "True or False" Program.* Shortly after Mutual's experience with the Lucky Strike program, Mutual secured the J. B. Williams Company as sponsor for a regular weekly program known as "True or False," at first [fol. 378] broadcast over a few stations and gradually expanding to more stations, including several also affiliated with National's Blue Network under restrictive contracts. National thereafter exercised its option-time privileges to force such stations to broadcast another network commercial program in the time required for "True or False" and, as a result of the hardships and inconveniences caused thereby, the advertiser discontinued the program on Mutual and transferred it to National's Blue Network, over which network the program has ever since been, and is still being, broadcast, on the same evening (Monday) every week.

(e) *The "Don't You Believe It" Program.* In 1939, because of the exploitation by National of said restrictive contract provisions to prevent expansion of the program to other stations and to force stations already broadcasting the program to discontinue or shift it to a delayed broadcast by transcription, Mutual lost the program "Don't You Believe It," sponsored by P. Lorillard & Sons, to National's Blue Network.

(f) *The "Famous Jury Trials" Program.* In 1938-1939, because of the exploitation by National of said restrictive contract provisions to force stations already broadcasting the program to discontinue or shift it, Mutual lost the program "Famous Jury Trials," sponsored by Mennen's. The sponsor went to a combination of Blue and Red stations.

(g) *The Phillip Morris Program.* In 1939, because of Mutual's inability to provide expansion into additional markets on an assured continuous basis because of National's restrictive contracts, Mutual lost a program sponsored by Phillip Morris & Company, and theretofore broadcast over the Mutual network, to National's Blue Network.

(h) *The "Goodwill Hour" Program.* Early in 1940, because of the exploitation by National of its restrictive contract provisions to force stations to discontinue or shift the program, Mutual lost the program "Goodwill Hour," previously broadcast over its network, to National's Blue Network, over which network the same program is still being broadcast regularly on Sunday evenings.

(i) *General.* The foregoing, while including the principal examples of network commercial programs known by affiant to have been lost by Mutual because of National and Colum- [fol. 379] bia's said restrictive contract provisions, is by no means a complete list. Throughout its existence, Mutual has regularly competed with National and Columbia for each new or prospective national advertiser, as far as known to it, and in the course of this competition a number of such advertisers have placed their business with National or Columbia under circumstances which, so far as known to affiant, indicate that factors based on the restrictive contract provisions either were determinative or contributed substantially to the result.

10. *Apprehended loss of further business by Mutual.* (a) *The Coco-Cola Company Program.* In September, 1941, Mutual entered into a contract with the D'Arcy Advertising Agency, acting in behalf of its client, Coco-Cola Company, for the broadcasting of a commercial network program over 118 stations affiliated with Mutual five nights a week from 10:15 to 10:30 p. m., and the sixth night from 10:15 to 10:45 p. m. This contract was secured after long and arduous negotiations in competition with National and Columbia, during which National sought to persuade the agency to use National's Blue Network on the representation that if Mutual were used the program would either be eliminated from certain stations or forced to a delayed broadcast by transcription at a less desirable hour. Nevertheless, for reasons having to do with the merits of the respective networks, Mutual was able to persuade the agency

and the client to contract with Mutual. Mutual, furthermore, called the attention of the agency and the client to the Commission's Order of May 2, 1941 and the accompanying regulations in answer to the representations made by National, and it is affiant's information and belief that, if it had not been for its so doing, the account would have gone to National. This account is the largest piece of business Mutual has had in its history and, so far as is known to affiant, it is the largest piece of business advertising a single product by any network. It represents over $2,250,000 gross billing annually. The program was scheduled to, and did, start November 3, 1941.

As soon as the fact became known that Mutual had secured the contract, National made redoubled efforts to deprive Mutual thereof through exploitation of its option-time contract provisions. Within 48 hours after Mutual had notified its affiliated stations of the Coco-Cola order, [fol. 380] National, which had previously been competing for the same program at the same or other hours, entered into contracts with one of the leading and best known advertising agencies for the broadcasting of two nationwide network commercial programs on Monday and Wednesday evenings from 10 p. m. to 10:30 p. m. for a large national advertiser, a manufacturer of drugs. Upon information and belief, affiant states that these specific hours were chosen primarily, if not entirely, to enable National to interfere with the broadcasting of Mutual's Coco-Cola program by stations having contracts with National. In any event, the result was that, on or about October 1, 1941, and thereafter, such stations were notified by National that National was exercising its option with respect to the two said half-hours beginning October 20 for two programs, the character of which said stations apparently had no knowledge. Because of such notifications from National, several such stations have been compelled to reject the Coco-Cola program, including stations at Tulsa, Okla., Birmingham, Ala., Houston, Tex., and Spokane, Wash. A number of other stations, however, similarly under contract with National, such as stations at Providence, R. I., Bridgeport, Conn., Richmond, Va., Cleveland, O., Charlotte, N. Car., Memphis, Tenn., Jacksonville, Fla., Ogden, Utah, and Des Moines, Ia., relying upon the Commission's regulations of May 2, 1941, as revised October 11, 1941, have declined to accede to Na-

tional's demands. Due to the number and importance of such cities, together with the other cities on the Mutual network, the advertiser has not left Mutual. Affiant believes and states the fact to be that, if the effective date of the regulations is postponed for any substantial period of time and National is permitted to compel these stations to adhere to their existing contracts, Mutual will lose this account. The client is unwilling, and has expressly stated its unwillingness, to take any station which does not broadcast the program all six evenings of the week on a live basis at the time scheduled (rather than by transcription), as otherwise the effectiveness of the particular advertising campaign of the client would be greatly impaired.

To illustrate the extremely unfavorable publicity which has already attended National's efforts to deprive Mutual of this program, affiant refers to articles appearing in *Variety*, October 8, 1941, at page 24, and *Broadcasting*, October 13, 1941, at page 14, copies of which appear in Appendix K.

[fol. 381] (b) *The Bayuk Cigar Company Program.* The Ivey and Ellington Agency, in behalf of its client, the Bayuk Cigar Company, has been a regular user of the Mutual network, purchasing initially three one-quarter hours and now using five one-quarter hours a week. In all of the important markets where there are only three stations, the advertiser has been compelled to accept delayed broadcasts by transcription. Within the last two months the advertiser has notified Mutual of its intention to discontinue the use of the Mutual network and to purchase the Columbia network because of the large number of delayed broadcasts by transcription to which the advertiser has been subjected over the Mutual network (due to National having exercised its privilege under option-time contracts and having placed other network commercial programs in the time used by the advertiser over such stations. The advertiser contemplated adding another broadcast period a week to its schedule. It was unwilling to accept any delayed broadcasts by transcription and insisted upon assured time as scheduled. In view of the Commission's action of October 11, 1941 and relying thereon, Mutual assured the advertiser that, if it would purchase 8:00 to 8:15 on Friday night, which was currently unused by National's Blue Network on its affiliate stations, Mutual would be able to provide Bayuk with uninterrupted broadcasting at the scheduled time. As a

result, the advertiser has renewed its contract and has added the additional one-quarter hour. If the option-time privilege is successfully exercised by NBC on any of these stations, the advertiser will definitely exercise its right of cancellation with the Mutual network, and Mutual and its affiliates will lose the program.

(c) *General.* The loss of the Cocoa-Cola and the Bayuk Cigar Company programs, or either of them, would greatly and irreparably injure Mutual and its affiliates from the point of view of both revenue and prestige. Mutual has, at present, a total of 14¼ hours a week sold for network commercial programs over stations under contract with National or Columbia, within periods of time embraced by option-time provisions in those contracts, in markets regarded as essential by advertisers. As long as the restrictive contracts are permitted to be maintained in force, Mutual is subject to the continuous hazard of losing all or [fol. 382] any portion of these programs. The figure constitutes a very considerable portion of Mutual's total of network commercial programs and the loss of all or any very large portion of the 14¼ hours a week would be fatal to Mutual's continued existence as a national network. Furthermore, until the Commission's Regulations go into effect, Mutual will be virtually unable to sell any more time for commercial network programs during the more desirable hours, namely, those covered by National's option-time provisions. Representatives of three of the largest advertising agencies in the country, handling a very large and important volume of national advertising, have expressly stated to Mutual that they will not purchase time over Mutual for any client of theirs in such hours unless and until Mutual can give assurance with respect to continued clearance of the scheduled time equal to that which National or Columbia is able to give.

11. *Effect on Mutual's ability to secure and retain desirable affiliates.* Loss of business and the consequent loss of prestige such as Mutual has already suffered because of the restrictive contract provisions and such as is threatened if those provisions are kept in force, has a serious adverse effect on Mutual's ability to secure and retain affiliate stations located in important markets and necessary to its successful operation as a national network. Under contracts between Mutual and its affiliates, the affiliates di-

rectly or indirectly bear the expenses of wire-lines necessary to link their stations with the Mutual network and, if the revenue received by an affiliate from Mutual drops below this expense (as is already the case in a number of instances), the affiliate tends to, and will, if the drop is substantial, terminate his affiliation with Mutual and thus deprive Mutual of an outlet in the market served by his station. In certain other instances where the affiliate's station has, for example, better coverage or a larger audience than the station affiliated with National's Blue Network serving the same market, Mutual will be unable to retain the affiliate as against the Blue Network and will be forced to accept a less desirable affiliate. Generally, the national network organization which is able, through volume of business or otherwise, to provide the larger revenue (subject to the qualification that it also provides the affiliate with a good continuous program service, commercial and sustaining), is [fol. 383] able to secure the station with the better coverage and the larger audience in any community, and to force the station to accept the maximum of whatever restrictions by way of exclusive option-time are permitted. Mutual, because of its smaller volume of business, is already under a heavy handicap in this respect, in competing for affiliates with either National's Red Network or Columbia's network, and is under somewhat of a handicap in competing for affiliates with National's Blue Network. Further loss of revenue will irreparably injure Mutual in this respect.

VI

Lack of Injury to National and Columbia Through Immediate Enforcement of Regulations

1. *Discussion limited to certain Regulations.* Affiant's discussion will be confined primarily to Regulations 3.101, 3.103, and 3.104, having to do respectively with network exclusivity, length of contract, and option-time. By their language, and the provision made by the Commission for such extensions of time as may be necessary, Regulation 3.106, having to do with network ownership of stations, and Regulation 3.107, having to do with the operation of two supposedly competing networks by one organization, do not appear to have or threaten any immediate effect on either National or Columbia. Columbia's complaint does not seek

relief against either of said Regulations or Regulation 3.108. Throughout its existence and without difficulty, Mutual has operated in conformity with Regulations 3.105 and 3.108, having to do with the affiliate's right to reject network programs and to fix its own rates on non-network commercial programs. Regulation 3.102, having to do with station exclusivity, obviously cannot operate to the injury of a network, but is of importance in a consideration of the effects of Regulations 3.101 and 3.104 and will be discussed incidentally in connection therewith.

2. *No adverse effect in cities adequately served by four or more full-time stations.* Apart from, and in addition to, the facts and circumstances recited in later paragraphs under this heading, Regulations 3.101 and 3.104, forbidding network exclusivity and restricting the use of option-time, cannot have any appreciable adverse effect on either National or Columbia in any city adequately served by four or more [fol. 384] full-time stations. In each such city, each of the four national networks (National's Red, National's Blue, Columbia, and Mutual) already has its regular full-time affiliate, and there will be no occasion or tendency on the part of any one of these networks to attempt to make use of a station affiliated with any of the others. It is very important to any network that, so far as possible in any city, it have a regular affiliate, (a) known and advertised to the public as such, available not only for its network commercial but also its network sustaining programs, (b) interested in promoting the network and securing business and goodwill for it, and (c) in a position to cooperate with the network in providing programs or facilities for securing programs originating in that locality. The network organization will willingly and regularly accept a station with smaller coverage as its regular affiliate in preference to sharing the time of a station with greater coverage with another network, and will willingly and regularly contract to give such station first call on its programs as permitted by Regulation 3.102. That a form of contract complying with the Regulations and at the same time preserving this right of first call in a manner satisfactory both to networks and to affiliates, can easily be worked out and formulated, has already been demonstrated by Mutual in the contracts which it has drafted for this purpose, hereinbefore described. Each network having given first call on its programs to its

respective affiliates, clearly there can be no such effects in such cities resulting from the operation of Regulations 3.101 and 3.104 as are stated or implied in the affidavits of Mr. Trammell and Mr. Paley. The unlikelihood of any complication arising from an attempt to create an "advertising super-network", is separately discussed below.

3. *No adverse effect with respect to time already in use for network commercial programs.* Nothing in the Commission's Regulations prevents, or interferes with, the carrying out by each network organization of any and all contracts with advertising agencies and advertisers for the use of any and all time now being used, or contracted to be used, over affiliated stations, for network commercial programs. This is true regardless of the amount or proportion of any station's time now subject to such contracts, regardless of the length of the period of time covered thereby, and regardless of the number of stations rendering adequate [fol. 385] service to a given city. Since virtually all such contracts are for a period of 52 weeks, and since ordinarily they expire in the early fall, the network commercial programs currently being broadcast thereunder over the National and Columbia networks will not, in the overwhelming majority of instances, be subject to disturbance or displacement in favor of the programs of another network or in favor of any non-network program earlier than the fall of 1942. Even then, due to the likelihood that the advertiser will desire to renew his contract for a further period of 52 weeks, due to the great interest, both financial and by way of prestige, which he, the affiliate, and the network have in such renewal, and due to the fact that, by reason of his continued use of such time, it will be clear for such purpose, the overwhelming probability is that it will be renewed over the same network and the same affiliate stations. In other words, neither the prohibition against network exclusivity nor the restrictions on option-time can have any adverse effect on time now already used over any station for National or Columbia network commercial programs. By the same token, but due to the Regulations becoming effective, time now actually in use over any station for Mutual programs cannot, during the period of the contract with the advertiser, be preempted for a new commercial program offered by another network.

4. *No adverse effect from limitation of option time to three hours per segment.* Passing over, for the moment, the requirement of Regulation 3.104 that option time provisions must henceforth be non-exclusive as between networks, affiant points out that, in the light of the undisputed facts, no adverse effect can result to National or Columbia from the limitation of network option-time to three hours per segment. Affiant states that, in the light of his experience, the Commission's division of the day into four segments (8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m and 11 p. m. to 8 a. m.) corresponds as nearly as is practicable, without undue complications of detail and with due regard for differences in time zones across the country, to the recognized and generally accepted listening habits of the public, the evaluation of the hours of the day as to relative desirability from the point of view of advertisers and the various classes thereof, and the needs for time on the part of non-network advertisers, for sustaining pro- [fol. 386] grams, and for purposes of programs of a local and regional character. The reservation by the Commission of anything over three hours in each segment free from network option corresponds very closely with actual practice in the case of those networks having the largest volume of network commercial programs, namely, National's Red Network and Columbia, and their affiliate stations. While in a few segments per week, one or the other of these networks may have slightly over three hours in actual use on some evenings on some (but by no means all) of their affiliate stations, the average actual use is substantially less than three hours per segment, and in those few instances where it is not, nothing in the Commission's Regulations prevents the continuance of such use under existing contracts with advertisers, or, with the consent of the stations involved, the renewal of such contracts.[17]

5. *No adverse effect from prohibition of option-time exclusive against other networks.* As affiant has already

[17] In the morning segment, from 8 a. m. to 1 p. m., National, under its existing contracts on both its Red and Blue Networks, has an option only on two hours (from 10 a. m. to noon), and in the afternoon segment, from 1 p. m. to 6 p. m., only three hours (from 3 p. m. to 6 p. m.). Its evening option is 3½ hours (7 p. m. to 7:30 p. m. and 8 p. m. to 11 p. m.). It has no option on time between 11 p. m. and 8 a. m.

shown, in cities adequately served by four or more full-time stations, the restrictions imposed by Regulation 3.104 (as well as Regulation 3.101) cannot, as a practical matter, have any adverse effect on either National or Columbia. Affiant will now show that, so far as any legitimate purpose of option-time is concerned, the same is true in cities adequately served by less than four full-time stations.

Because of the inherent characteristics of network broadcasting, including virtually instantaneous transmission over wire-lines to all parts of the country and simultaneous broadcasting by many stations of the same program, it is highly important, as a business convenience, that obstacles to the necessary clearance over the desired stations be eliminated so far as practicable. These obstacles, however, consist primarily in the scheduling by individual stations of *non-network programs* (local or national spot) at [fol. 387] various hours, and, in the absence of provision for clearance of time against such programs, make it necessary for the network to consult, and in some instances, negotiate, for clearance of the time desired for a particular network commercial program. Such obstacles are not insuperable, as has been demonstrated by the operation of the Mutual network without option-time from its establishment in the fall of 1934 until early in 1940, and even since then with respect to a large number of its affiliates, as well as by the operation of National's networks without option-time to any substantial degree until after 1935. Regulation 3.104, however, permits option-time affording adequate and entirely sufficient clearance for three hours per segment against all such obstacles.[18]

[18] Mr. Trammell's statement in his affidavit (page 20) is, in the light of the facts above stated, completely without foundation:

"Consequently, if optional time is prohibited, each and every advertising contract negotiated for such hours on the Red network would require negotiation by NBC with a minimum of 44 stations. In the normal course of its business, each of these stations would, under the Commission's amended Order, be scheduling the programs of other networks. Despite these conflicting demands, therefore, NBC would have to obtain the unanimous consent of not less than 44 persons, firms and corporations for each program scheduled."

By reason of their large existing use of the more desirable hours in each segment, the fact that existing contracts with advertisers are not disturbed by the Regulations, and the fact that each affiliate will desire to, and will, obtain first call upon the programs of any network with which it is affiliated, neither National's Red Network nor Columbia can possibly suffer any appreciable adverse effect from the restriction under discussion. Their respective affiliates in cities having less than four full-time stations will desire to remain their affiliates and to have first call on their programs. The case is somewhat different with National's Blue Network which, by reason of its smaller volume of business, is actually making use of only part of the time of its affiliate stations which National has under option. It will be adversely affected in that in cities served by less [fol. 388] than four full-time stations, with respect to those hours which it now has under option but has not been able to sell to any advertiser, it will (if the Regulation goes into effect) henceforth be deprived of its power to prevent its affiliates in such cities, at their discretion, from accepting and assuring the continuous broadcasting at the scheduled hour of network commercial programs provided by another network. In other words, National will, with respect to its Blue Network, be unable to exploit network option-time as a device to prevent or eliminate competition by another network, as distinguished from the legitimate purpose of option-time to provide simultaneous clearance over a number of stations as against non-network programs.

The prohibition against exclusive options will neither introduce nor lead to any appreciable confusion, difficulty in clearance, or necessity for negotiating with a number of stations as a prerequisite to entering into a contract with an advertiser. Each national network organization knows, and continuously maintains up-to-date information on, the use made by each of its affiliates of all time likely to be in demand for network commercial programs, and, in the case of cities adequately served by less than four full-time stations in which its affiliate may be serving also as the affiliate for another network, knows, and continuously maintains up-to-date information on, all time used over the station by the other network. Prospective national advertisers desiring new network commercial programs, or programs in addition to those already being broadcast, are not numerous and usually appear or become available singly and at the

rate of only a very few per year. In all but a tiny fraction of cases, all four national network organizations know of each prospect and actively compete for his business. Since most of the more desirable hours, particularly in the evening, are already in use over National's Red Network and Columbia, in most instances the competition is reduced to being between National's Blue Network and Mutual, each of which endeavors to provide the advertiser with access to the markets desired by him and in so doing offers access to the *same* stations in many cities (already enumerated) adequately served by less than four full-time stations. Once the time in question over these stations is sold to the advertiser by one of these networks, it is, of course, unavailable over these same stations to the other network for the period of the contract with the advertiser (in the absence [fol. 389] of exclusive option-time provisions in favor of the other network, such as are now exploited by National), but this is no more a disadvantage to one network than to the other, and is no more an injury to one advertiser than another, and cannot rightly be considered an injury to anyone, much less to broadcasting as an advertising medium. If it be deemed an injury to one network, it is relatively slight and is more than counterbalanced by the benefit to the affiliated stations and their audiences, and by the benefits resulting from active and fair competition on the merits of the competitors.

6. *No adverse effect from limitation of call period to 56 days.* So far as affiant knows, in all existing contracts of National and Columbia, the options may be exercised on not less than 28 days' notice. The increase in this call period to 56 days will not, in affiant's opinion, have any appreciable effect, adverse or otherwise. The time required for arranging the details of producing the program and the fact that in most instances a program to be broadcast during a given year, usually beginning in the fall, is actually contracted for more than 56 days in advance of its commencement or its renewal, will make adjustment to the new requirement a very simple matter involving no real inconvenience. Nothing in Regulation 3.104 prevents a station from accepting a network commercial program offered it on less than 56 days' notice.

7. *The apprehended "advertising super-netwwork."* Of the various chimæric alarms which have been conjured up

to incite opposition to the Commission's Regulations, the apprehended "advertising super-network" is the most fantastic. Among the obstacles which eliminate this as a practical possibility are

a) the tremendous and uneconomic expense of leasing the necessary wire-lines (including the greatly increased proportionate expense involved in leasing wire-lines for short periods weekly), and the difficulty of securing such lines reaching many important and indispensable markets.

b) the fact that such a network, in order to hold its affiliates and justify its continued existence, would have to provide a sustaining program service for its affiliates, with attendant expenses in studio, equipment, staff, engineering, [fol. 390] promotion and publicity, all at a disproportionate cost,

c) the fact that on almost all the stations that would be necessary to constitute such a network, virtually all their desirable hours are now in actual use either for network commercial programs, or for non-network commercial programs (local or national spot), providing a greater revenue than could possibly be provided by the "super-network" advertisers,

d) the unwillingness of the owners of stations such as would be necessary to constitute such a network, to deal or affiliate themselves with any transient or fly-by-night venture, or any venture having an adverse effect upon the stations' total revenue.

The fact that no attempt has been made in the past to set up such a network, either in the period prior to 1935 when National had no exclusivity provisions and only inconsiderable option-time provisions in its contracts, or since 1935 during hours not subject to option or, if subject, not actually used, demonstrates that it is not a reasonable possibility. To add to the unlikelihood that the possibility has any practical significance, affiant points to the fact that the 64-station hook-up suggested for such a purpose in Exhibit I attached to Mr. Trammell's affidavit, includes, as nearly as affiant can calculate, 44 stations which are now affiliated with National's Red Network, 15 stations which are now affiliated with Columbia, and 5 stations which are now affiliated with National's Blue Network. In other words, even in the present state of affairs, National's Red Net-

work comes very close to being the apprehended "super-network", and, if present tendencies are permitted to continue under the restrictive contracts, National's Red Network and Columbia will actually constitute such network, to the disadvantage and eventual exclusion of all effective competitors.

8. *Apprehended diversion of advertising to other media.* The apprehension asserted in behalf of National and Columbia that the Regulations will result in diversion of advertising from radio to other media, is without foundation. As already pointed out, so far as clearance of time over affiliate stations serves any legitimate need or convenience, it is permitted by the Regulations, and the advertiser, once [fol. 391] having contracted through a network for a given period of time over a specified list of stations, will be assured (to a much greater extent than at present in the case of Mutual and to the same extent as at present in the case of National and Columbia) of continued use of the time for the period of his contract. The effectiveness of radio as a medium to reach the public cannot possibly be impaired, and should be enhanced, by enforcing the Regulations.

9. *Apprehended elimination or impairment of sustaining program service.* The charge that enforcement of the Regulations will result in elimination or impairment of sustaining program service by the networks is directly contrary to fact. To be successful in competition with other networks, each network must offer its affiliates, and through them the public, a continuous sustaining program service of excellent character and embracing varied features. The shortcomings of any one network in this respect will inevitably be reflected in loss of audience and public favor, in loss of the better affiliates in each city, and in eventual loss of the patronage of advertisers, to the advantage of such network's competitors.

10. *No adverse effect from two-year limitation on length of contracts.* Affiant is unable to perceive or anticipate any adverse effect on any network from Regulation 3.103, placing a two-year limitation on the contracts between networks and affiliates, as distinguished from the five-year term now prevailing *except* that, in the course of competition between networks for affiliates, a shorter term may eventually conduce toward bringing about more frequent adjustments of the rate of compensation paid by the network to the sta-

tion so as to provide the station with a more nearly fair and adequate share of the profits of network broadcasting. This, however, will be a slow process in any event and will not be particularly marked or substantial during the next two years.[19]

11. *General:* Over and above what affiant has already stated, affiant repeats and emphasizes the fact that, for the [fol. 392] usual business year in broadcasting, from September to September, virtually all business that is likely to be placed on national networks has already been placed (except for occurrences such as have already been pointed out, consisting of National's practices under its contracts and their effect on Mutual's programs). Except in the case of Mutual, where the effect is salutary, the Regulations have, and can have, no effect on existing network business for the duration of current contracts with advertisers (therefore, until September, 1942). Assertions such as are made by Mr. Trammell in his affidavit (pages 19, 21) or by Mr. Paley in his affidavit (pages 34-35) that the Regulations, either taken together or separately, will "destroy the present structure of network broadcasting" are absurd in view of the known and undisputed facts.

Fred Weber.

Subscribed and sworn to before me this 11th day of December, 1941. —— ——, Notary Public. —— County, N. Y. Co. Clk's No. —, Reg No. —. Term expires —— —, 194—. (Seal.)

[19] In this connection it should be noted, with reference to two of the affidavits filed by National, the contract of WOW, Omaha, with National expired December 2, 1941, and the contract of WHAM, Rochester, with National will expire February 1, 1942.

[fol. 388]

APPENDIX A

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power Day	Power Night	Frequency (kilocycles)	Hours of Operation
WOR	New York, N. Y.	11,690,520		50,000	50,000	710	Unlimited
WGN	Chicago, Ill.	4,499,126		50,000	50,000	720	"
WIP	Philadelphia, Pa.	2,898,644		5,000	5,000	610	"
CKLW	Detroit—Windsor, Mich.	2,295,867		5,000	5,000	800	"
WLOL	Minneapolis-St. Paul, Minn.	911,077		1,000	1,000	1,330	"
WHK	Cleveland, Ohio	1,214,943	N.B.C. Blue	5,000	5,000	1,420	"
WCLE	Cleveland, Ohio	1,214,943		500	......	610	Daytime
WOL	Washington, D. C.	907,816		1,000	1,000	1,260	Unlimited
WFBR	Baltimore, Md.	1,046,692		5,000	5,000	1,300	"
KWK	St. Louis, Mo.	1,367,977		5,000	5,000*	1,380	"
WCAE	Pittsburgh, Pa.	1,994,060		5,000	5,000	1,250	"
WGR	Buffalo-Niagara, N. Y.	857,719		5,000	1,000	550	"
WKRC	Cincinnati, Ohio	789,309		5,000	1,000	550	"
KITE	Kansas City, Mo.-Kans.	634,093		1,000	1,000	1,590	"
WHB	Kansas City, Mo.-Kans.	634,093		1,000	......	880	Daytime
WIBC	Indianapolis, Ind.	455,357		5,000	1,000	1,070	Unlimited
KFEL	Denver, Colo.	384,372		5,000	5,000	950	"
WSAY	Rochester, N. Y.	411,970		250	250	1,240	"
WHKC	Columbus, Ohio	365,796		500	......	640	L-KFI
WAGE	Syracuse, N. Y.	258,352		1,000	1,000	620	Unlimited
WHBF	Rock Island-Davenport-Moline, Ill.-Ia.	174,995		5,000	5,000	1,270	"
KFOR	Lincoln, Neb.	88,191		250	250	1,240	"

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APPENDIX A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power Day	Power Night	Frequency (kilocycles)	Hours of Operation
	COLONIAL STATIONS						
WAAB	Boston, Mass.	2,350,514		1,000	1,000	1,440	Unlimited
WEAN	Providence, R. I.	711,500	N.B.C. Blue	5,000	5,000*	790	"
WFCI	Pawtucket, R. I.						
	Providence, R. I.	711,500		1,000	1,000	1,420	"
WTHT	Hartford, Conn.						
	New Britain, Conn.	502,193		250	250	1,230	"
WELI	New Haven, Conn.	308,228		1,000	500	960	"
WSPR	Holyoke-Springfield, Mass.	394,623		500	500	1,270	"
WICC	Bridgeport, Conn.	216,621	N.B.C. Blue	1,000	500	600	"
WATR	Waterbury, Conn.	144,822		1,000*	1,000*	1,320	"
WNBH	Fall River-New Bedford, Mass.	272,648		250	250	1,340	"
WSAR	Fall River-New Bedford, Mass.	272,648		1,000	1,000	1,480	"
WLLH	Haverhill-Lowell-Lawrence, Mass.	334,969		250	250	1,400	"
WBRK	Pittsfield, Mass.	49,684		250	250	1,340	"
WCOU	Lewiston, Me.	38,598		250	250	1,240	"
WNLC	New London, Conn.	30,456		250	250	1,490	"
WSYB	Rutland, Vt.	17,082		1,000*	1,000*	1,380*	"
WHAI	Greenfield, Mass.	15,672		250	250	1,240	"
WLNH	Laconia, N. H.	13,484		250	250	1,340	"

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DON LEE

KHJ	Los Angeles, Cal.	2,904,596		5,000	5,000*	930	Unlimited
KFRC	San Francisco-Oakland, Cal.	1,428,525		5,000	5,000	610	"
KOL	Seattle, Wash.	452,639		5,000	5,000*	1,300	"
KALE	Portland, Ore.	406,406		5,000	5,000	1,330	"
KGB	San Diego, Cal.	256,368		1,000	1,000	1,360	"
KGA	Spokane, Wash.	141,370	N.B.C. Blue	10,000*	10,000*	1,510	"
KMO	Tacoma, Wash.	156,018		5,000	5,000	1,360	"
KTKC	Visalia-Fresno, Cal.	97,504		5,000*	5,000*	940*	"
KPMC	Bakersfield, Cal.	29,252		1,000	1,000	1,600	"
KFXM	San Bernardino, Cal.	43,646		250	250	1,240	S-KPPC
KDB	Santa Barbara, Cal.	34,958		250	250	1,490	Unlimited
KIT	Yakima, Wash.	27,221		1,000	1,000	1,280	"
KVOE	Santa Ana, Cal.	31,921		250	250	1,490	"
KRKO	Everett, Wash.	30,224		250	100	1,400	"
KORE	Eugene, Ore.	20,838		250	250	1,450	"
KFJI	Klamath Falls, Ore.	16,497		100	100	1,240	"
KXRO	Aberdeen, Wash.	18,846		250	250	1,340	"
KIEM	Eureka, Cal.	17,055		1,000	500	1,480	"
KGY	Olympia, Wash.	13,254		100	100	1,240	"
KMYC	Marysville, Cal.	6,646		100	100	1,450	"
KYOS	Merced, Cal.	10,135		250	.....	1,080	Daytime
KXO	El Centro, Cal.	10,017		100	100	1,490	Unlimited
KHSL	Chico, Cal.	9,287		1,000	1,000*	1,290	"
KVEC	San Luis Obispo, Cal.	8,881		250	250	1,230	"

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Appendix A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power Day	Power Night	Frequency (kilocycles)	Hours of Operation
KDON	Monterey, Cal.	10,084		250*	250*	1,240	Unlimited
KVCV	Redding, Cal.	8,109		250	250	1,230	″
KOOS	Marshfield, Ore.	5,259		250	250	1,230	″
KWLK	Longview, Wash.	12,385		250	250	1,400	″
KRNR	Roseburg, Ore.	4,924		250	250*	1,490	″
KELA	Centralia, Wash.	7,414		1,000	1,000	1,470	″
KWIL	Albany, Ore.	5,654		250	250	1,240	″
KAST	Astoria, Ore.	10,389		250	250	1,230	″
		NORTHEAST GROUP					
WJW	Akron, Ohio	349,705		250	250	1,240	″
WABY	Albany, N. Y.	431,575		250	250	1,400	″
WILM	Wilmington, Del.	188,974		250	250	1,450	″
WARM*	Wilkes-Barre-Scranton, Pa.	629,581		250	250	1,400	″
WHBC	Canton, Ohio	200,352		250	250	1,230	″
WKBO	Harrisburg, Pa.	173,367	N.B.C. Red, Blue	250	250	1,230	″
WNBF	Binghamton, N. Y.	145,156	C.B.S.	5,000*	5,000*	1,290*	″
WBAX	Wilkes-Barre-Scranton, Pa.	629,581		100	100	1,240	″
WGAL	Lancaster, Pa.	132,027	N.B.C. Red, Blue	250	250	1,490	″
WORK	York, Pa.	92,627	N.B.C. Red, Blue	1,000	1,000	1,350	″
WENY	Elmira, N. Y.	45,106		250	250	1,230	″
WSTV	Steubenville, Ohio	37,651		250	250	1,340	″
WEST	Easton, Pa.	33,589		250	250	1,400	″
WLBZ	Bangor, Me.	29,822	N.B.C. Red, Blue	5,000*	5,000*	620	″
WEIM*	Fitchburg, Mass.	41,824		250	250	1,340	″
WPAY	Portsmouth, Ohio	40,466		250*	250*	1,400	″
WJEJ	Hagerstown, Md.	32,491		250	250	1,240	″

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WAZL	Hazleton, Pa.	38,009		250	250	1,450	Unlimited
WRDO	Augusta, Me.	19,360	N.B.C. Red, Blue	100	100	1,400	"
WFEA	Manchester, N. H.	77,685	N.B.C. Red	5,000*	5,000*	1,370	"
			Mid-West Group				
KOIL	Council Bluffs-Omaha, Ia.-Neb.	287,698	C.B.S.	5,000	5,000	1,290	"
KSO	Des Moines, Ia.	183,973	N.B.C. Blue	5,000	5,000*	1,460	"
WLAV	Grand Rapids, Mich.	209,873		250	250	1,340	"
KFBI	Wichita, Kans.	127,308		5,000	1,000	1,070	"
WROK	Rockford, Ill.	105,259		1,000	500	1,440	"
KGHI	Little Rock, Ark.	126,724		250	250	1,230	"
WMT	Cedar Rapids, Ia.	73,219	C.B.S.	5,000	5,000	600	"
KDTH	Dubuque, Ia.	43,892		1,000	1,000	1,370	"
KSAL	Salina, Kans.	21,073		1,000	1,000	1,150	"
KOTN	Pine Bluff, Ark.	21,290		250	250	1,490	"
KWFC	Hot Springs, Ark.	21,370		250	250	1,340	"
KWOS	Jefferson City, Mo.	24,268		250	250	1,240	"
KTSW	Emporia, Kans.	13,188		250	250	1,400	"
KGGF	Coffeyville, Kans.	17,355		1,000	500	690	"
KBTM	Jonesboro, Ark.	11,729		250	100	1,230	"
KMA	Shenandoah, Ia.	6,846	N.B.C. Blue	5,000	1,000	960	"
KVGB	Great Bend, Kans.	9,044		250	250	1,400	"
			Southeast Group				
WRNL	Richmond, Va.	245,674	N.B.C. Blue	5,000*	5,000*	910	"
WGH	Portsmouth-Newport News-Norfolk, Va.	323,326		250	250	1,340	"

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Appendix A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power Day	Power Night	Frequency (kilocycles)	Hours of Operation
WSOC	Charlotte, N. C.	112,986	N.B.C. Red	250	250	1,240	Unlimited
WSLS	Roanoke, Va.	110,593		250	250	1,490	"
WCOS	Columbia, S. C.	89,555	N.B.C. Blue	250	250	1,400	"
WCMI	Huntington-Ashland, W. Va.-Ky.	170,979		250	250	1,340	"
WAIR	Winston-Salem, N. C.	109,833		250	250	1,340	"
WMRC	Greenville, S. C.	34,734		250	250	1,490	"
WRAL	Raleigh, N. C.	46,897		250	250	1,240	"
WLVA	Lynchburg, Va.	44,541		250	250	230	"
WBTM	Danville, Va.	32,749		250	250*	1,400	"
WSTP	Salisbury, N. C.	19,037		250	250	1,490	"
WBBB	Burlington, N. C.	12,198		1,000	......	920	Daytime
			Southern Group				
WATL	Atlanta, Ga.	442,294		250	250	1,400	Unlimited
WNOE	New Orleans, La.	540,030		250	250	1,450	"
WMPS	Memphis, Tenn.	332,477	N.B.C. Blue	1,000	500	1,460	"
WGRC	Louisville, Ky.	434,408		250	250	1,400	"
WSGN	Birmingham, Ala.	407,851	N.B.C. Blue	1,000	1,000	610	"
WSIX	Nashville, Tenn.	241,769		5,000*	5,000*	980*	"
WJHP	Jacksonville, Fla.	195,619	N.B.C. Blue	250	250	1,320	"
WDEF	Chattanooga, Tenn.	193,215		250	250	1,400	"
WBIR	Knoxville, Tenn.	151,829		250	250	1,240	"
WTSP	St. Petersburg-Tampa, Fla.	209,693		1,000	500	1,380	"
WGBF	Evansville, Ind.	141,614	N.B.C. Red, Blue	5,000	1,000	1,280	"

[fol. [illegible]]

WLAP	Lexington, Ky.	49,304		250	250	1,450	Unlimited
WMOB	Mobile, Ala.	114,906		250	250	1,230	"
WBML	Macon, Ga.	74,830		250	250	1,240	"
WJBY	Gadsden, Ala.	36,975		250	250	1,240	"
WTJS	Jackson, Tenn.	24,332		1,000*	1,000*	1,390	"
WALB	Albany, Ga.	19,055		1,000	1,000	1,590	"
WRUF	Gainesville, Fla.	13,757		5,000	......	850	L-KOA
WHBB	Selma, Ala.	19,834		100	100	1,490	Unlimited
WMSL	Decatur, Ala.	16,604		250	250	1,400	"
WBLJ	Dalton, Ga.	10,448		250	250	1,230	"
WDAK	West Point, Ga.	3,591		250	250	1,340	"

Southwest Group

KXYZ	Houston, Tex.	510,397	N.B.C. Blue	5,000*	5,000*	1,320*	"
WRR	Dallas, Tex.	376,548		5,000*	5,000*	1,310	"
KABC	San Antonio, Tex.	319,010		250	250	1,450	"
KFJZ	Fort Worth, Tex.	207,677		5,000*	5,000*	1,270	"
KOCY	Oklahoma City, Okla.	221,229		250	250	1,340	"
KOME	Tulsa, Okla.	188,562	N.B.C. Blue	250	250	1,340	"
KNOW	Austin, Tex.	106,193		250	250	1,490	"
KRIS	Corpus Christi, Tex.	70,677	N.B.C. Red, Blue	1,000	1,000	1,360	"
KPAC	Beaumont-Port Arthur, Tex.	138,608		500	500	1,250	"
KFDA	Amarillo, Tex.	53,463		250	250	1,230	"
WACO	Waco, Tex.	71,114		250	250	1,450	"
KGKL	San Angelo, Tex.	25,802		250	250	1,400	"

[fol. 400]

Appendix A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power Day	Power Night	Frequency (kilocycles)	Hours of Operation
KCMC	Texarkana, Tex.	28,840		250	250	1,450	Unlimited
KRBC	Abilene, Tex.	26,612		250	250	1,450	"
KBST	Big Spring, Tex.	12,604		100	100	1,490	"
KRRV	Sherman, Tex.	17,156		1,000	1,000	910	"
KTEM	Temple, Tex.	15,344		250	250	1,400	"
KRGV	Weslaco, Tex.	6,883	N.B.C. Red, Blue	1,000	1,000	1,290	"
			Northwest Group				
WHBL	Sheboygan, Wis.	40,368		1,000*	1,000*	1,330	"
WHBY	Appleton, Wis.	28,436		250	250	1,230	"
WFHR	Wisconsin Rapids	11,416		250	250	1,340	"
KFIZ	Fond Du Lac, Wis.	27,209		250	250	1,450	"
WSAU	Wausau, Wis.	27,268		250	250	1,400	"
WHDF	Calumet, Mich.	Under 5,000		250	250	1,400	"
WDSM	Duluth-Superior, Minn.-Wis.	157,098		100	100	1,230	"
KTRI	Sioux City, Ia.	87,791		250	250	1,450	"
KVOX	Fargo-Moorhead, N. D.	42,071		250	250	1,340	"
KVFD	Ft. Dodge, Ia.	22,904		250	250	1,400	"
KWNO	Winona, Minn.	22,490		250	250	1,230	"
KGCU	Bismarck-Mandan, N. D.	22,181		250	250	1,270	"
KABR	Aberdeen, S. D.	17,015		5,000	5,000	1,420	"
KLPM	Minot, N. D.	16,577		1,000	1,000	1,390	"
KATE	Albert Lea, Minn.	12,200		250	250	1,450	"
KGDE	Fergus Falls, Minn.	10,[illegible]48		250	100	1,230	"
KRMC	Jamestown, N. D.	8,790		250	250	1,400	"

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KDLR	Devils Lake, N. D.	6,204		250	250	1,240	Unlimited
KWLM	Willmar, Minn.	7,623		250	250	1,340	"
WJMS	Ironwood, Mich.	13,369		250	250	1,450	"
WATW	Ashland, Wis.	11,101		100	100	1,400	"
			Mountain Group				
KLO	Ogden-Salt Lake City, Utah	204,488	N.B.C. Blue	5,000	5,000	1,430	"
KFXJ	Grand Junction, Colo.	12,479		1,000*	500*	920*	"
KFKA	Greeley, Colo.	15,995		1,000	1,000	910	S-KPOF
KOVO	Provo, Utah	18,071		250	250	1,240	Unlimited
KEUB	Price, Utah	5,214		250	250	1,450	"
			Group Outside United States				
KGMB	Honolulu, T. H.			5,000	5,000	590	"
KHBC	Hilo, T. H.			250	250	1,230	"
KGBU	Ketchikan, Alaska			500	500	930	"
CKLW	Windsor, Ontario (Previously listed)						

* Construction permit only.

NOTE: The affiliations and facilities above listed are corrected to November 1, 1941. City populations based on 1940 census figures; metropolitan district figures used whenever applicable. Affiliations based upon November 1, 1941 edition of Standard Rate and Data, except Mutual, whose affiliations are based upon its own files.

[fol. 802]

Appendix B

Comparison of Facilities of Broadcast Stations Affiliated with the Four National Networks

(As of November 1, 1941)

Full-time Stations

	Size of City	National (Red)	National (Blue)	Columbia	Mutual
Clear Channel 50 kw.	1,000,000 up	9[1]	3[2]	6	2
	500,000 "	3	1	6	..
	100,000 "	6	3	8	..
	25,000 "	1	1	..	..
		19[3]	8[3]	20	2
Clear Channel below 50 kw.	1,000,000 up	..	2	..	..
	500,000 "	..	..	..	..
	100,000 "	1	5	5	3
	25,000 "	1	.	2	1
	10,000 "	..	1	..	1
		2[4]	8[4]	7	5[5]
Regional (1 kw. to 5 kw.)	1,000,000 up	3	6	5	3
	500,000 "	8	7	5	8
	100,000 "	28	22	34	19
	25,000 "	16	20	20	9
	10,000 "	4	5	4	9
	5,000 "	..	2	1	4
	5,000 down	1	..	..	..
		60[6]	62[6]	69	57[7]
Regional (less than 1 kw. at night)	1,000,000 up	..	..	..	..
	500,000 "	..	..	..	..
	100,000 "	2	5	.	7
	25,000 "	2	2	..	..
	10,000 "	1	2	..	1
		5[8]	9[8]		8[9]
Local (100 w. to 250 w.)	1,000,000 up	..	1	..	..
	500,000 "	1	3	..	4
	100,000 "	11	12	8	24
	25,000 "	8	24	6	35
	10,000 "	12	16	6	30
	5,000 "	2	4	..	10
	5,000 down	1	1	..	3
		35[4]	61[4]	20	106[10]

[fol. 403]

Appendix B—Continued

Comparison of Facilities of Broadcast Stations Affiliated with the Four National Networks

(As of November 1, 1941)

Part-time Stations

	Size of City	National (Red)	National (Blue)	Columbia	Mutual
Clear Channel 50 kw.	100,000 up	1	..	..	..
		1	..	..	..
Clear Channel below 50 kw.	500,000 up	..	..	..	1
	100,000 "	..	1	..	1
	25,000 "	1	1	..	..
	10,000 "	1	1	1	2
		2[8]	3[9]	1	4
Regional (1 kw. to 5 kw.)	1,000,000 up	..	..	..	1
	500,000 "	..	1	1	..
	100,000 "	..	..	..	..
	25,000 "	..	..	1	..
	10,000 "	..	..	..	2
		..	1	2	3
Regional (less than 1 kw. at night)	1,000,000 up	..	..	..	..
	500,000 "	..	..	..	..
	100,000 "	1	1	..	..
		1[4]	1[4]	..	..
Local (100 w. to 250 w.)	25,000 up	..	..	..	1
		..	..	..	1
Total		125	153	119	186

[1] WFAA-WBAP treated as one full-time station.
[2] WENR-WLS treated as one full-time station.
[3] Includes 2 stations affiliated with both Red and Blue.
[4] Includes 1 station affiliated with both Red and Blue.
[5] Includes 1 station primarily affiliated with N.B.C. Blue.
[6] Includes 19 stations affiliated with both Red and Blue.
[7] Includes 3 stations primarily affiliated with Columbia, 4 with both N.B.C. Red and Blue, 7 with N.B.C. Blue, and 2 with N.B.C. Red.
[8] Includes 4 stations on both N.B.C. Red and Blue.
[9] Includes 3 stations primarily with N.B.C. Blue.
[10] Includes 3 stations primarily affiliated with both N.B.C. Red and Blue, 3 with N.B.C. Blue, and 1 with N.B.C. Red.

Note.—Only stations within continental United States are considered. Population figures based upon 1940 census, with metropolitan districts used when applicable. Classifications include facilities authorized by construction permit only.

[fol. 404]

Appendix C

Affiant's Letter to Mutual Stockholders, October 31, 1941

Mutual Broadcasting System, Inc.

New York Office: 1440 Broadway, New York

October 31, 1941.

To: Stockholders of the Mutual Broadcasting System:

As you are aware, the Monopoly Regulations of the Federal Communications Commission become effective on November 15, 1941. In view of the short time remaining before that effective date, we send you herewith a letter agreement modifying your existing contract with Mutual, and request that you immediately execute it and return it to us.

We are at present preparing new contracts which will embody the various changes required by the Monopoly Regulations, as well as other changes which have been discussed at our Board of Directors Meetings. These contracts will be submitted to you as soon as possible, after which the date of the next meeting of the Board of Directors will be advised.

Your cooperation in immediately returning the enclosed agreement, signed by you, to our Chicago office, attention of Mr. E. M. Antrim, will be greatly appreciated.

With kindest regards, Fred Weber.

FW:mk
Enc.

Appendix D

Mutual's Agreement with its Stockholders, October 31, 1941

Mutual Broadcasting System, Inc.

Branch Office: 1440 Broadway, New York

October 31, 1941.

Gentlemen:

Confirming the understanding between us, it is agreed that notwithstanding anything to the contrary contained in the contract between you and the Mutual Broadcasting System, Inc.,

[fol. 405] (1) The option time referred to in said contract shall be exclusive, except as against other network organizations, it being understood that notwithstanding such option time, y a will not be prevented or hindered from optioning (under non-exclusive options) or selling any or all of said option time, or other time, to other network organizations. You will clear and furnish to Mutual any period or periods of time within said option time for broadcasting of any Mutual commercial network program or programs upon fifty-six (56) days' notice from Mutual, unless prior to such notice from Mutual you shall have actually made a bona fide sale to another network organization of the period or periods of time within said option time required by Mutual for the advertiser. No commitment to any other network organization made in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission shall be deemed to be a bona fide sale for the purpose of this paragraph. You may refuse to execute a commitment to furnish broadcasting time to Mutual for the broadcasting of any program or programs which you reasonably believe to be unsatisfactory or unsuitable.

(2) The provision of said contract with regard to your exclusive association with Mutual is hereby revoked and rescinded.

(3) Any other provisions of said contract in violation of Section 3.101,-3.108 both inclusive of the Regulations of the Federal Communications Commission is hereby revoked and rescinded.

The provisions of this letter shall become effective immediately.

Except as herein specifically modified, said contract shall continue in full force and effect.

If the provisions of this letter meet with your approval will you please indicate your assent thereto by affixing your signature on each of the enclosed copies of this letter and return to our Chicago Office, attention of Mr. E. M. Antrim.

Yours very truly, Mutual Broadcasting System, Inc.,
By Fred Weber, General Manager.

FW:pwh.
Approved ———.
Date ———.

[fol. 406] APPENDIX E

Mutual's Proposed Contract to Conform to the Revised Regulations

This Agreement, made at Chicago, Illinois, as of ———, 194—, between Mutual Broadcasting System, Inc., and Illinois corporation (hereinafter called "Mutual"), and ——— (hereinafter called the "Broadcaster"),

Witnesseth:

The Broadcaster is the owner and operator of radio station ———, located at ——— (hereinafter called the "Station").

Mutual is engaged in the operation of a national radio broadcasting network composed of stations which are owned or operated by or affiliated with Mutual's shareholders and of other stations which are from time to time affiliated with the Mutual network. It is the intention of Mutual and the Broadcaster that the network shall remain cooperative in character, and that the stations composing the network shall retain the advantages thereof, including: effective control on the part of such stations of the acceptance or rejection of programs to the end that the public interest may be best served, full participation in the profits of network operation, the preservation of local control and ability to meet local and regional needs in the public interest, the greater geographical diversification of program-originating points, the prevention of tendencies toward monopoly and toward concentration of program control in a small group or in a particular locality, and the furtherance of the principle of competition.

The Broadcaster and Mutual are desirous of entering into an agreement, on the terms and conditions hereinafter set forth, for the affiliation of the Station with the Mutual network and for the sale by the Broadcaster and the purchase by Mutual of broadcasting time on the Station for the broadcasting of Mutual network commercial programs.

Now, Therefore, It Is Mutually Agreed as Follows:

1. Mutual will contract with the American Telephone and Telegraph Company for the maintenance by the latter, commencing on ——, 194—, of a program transmission line extending to ——.

[fol. 407] 2. Mutual and the Broadcaster will each publicize the Station as the regular Mutual outlet in the city in which the Station is located. The Station shall have the right to the first call on Mutual network commercial and sustaining programs in said city and Mutual shall not offer any series of programs or single program (not a part of a series) to any other radio station located in said city unless said series of programs or single program has been offered to the Broadcaster for broadcasting through the Station under this contract and the Broadcaster shall have failed or refused to accept such program or programs within forty-eight (48) hours after Mutual's offer.

(A) In the case of a commercial program or a series of commercial programs:

(1) If the Broadcaster is unable to clear the required period or periods of time on the Station for such program or programs but notifies Mutual within said 48 hours that the Broadcaster can clear a mutually satisfactory substitute period or periods and is able and willing to broadcast the program or programs by means of off-the-line recordings (made by the Broadcaster without cost to Mutual or the advertiser) during such substitute period or periods, Mutual will accept such substitute period or periods, unless the advertiser is unwilling to accept such broadcasting by the Station by means of off-the-line recordings during such substitute period or periods, it being understood that Mutual is not obligated to require the advertiser to accept such delayed broadcasting; and

(2) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs scheduled to run for thirteen weeks or more or a series of separable programs, but notifies Mutual within said 48 hours that the Broadcaster will clear said periods of time upon a specified date not later than four (4) weeks after the commencement of the series of programs, Mutual will contract for such periods of time on the Station as of the specified date upon which the Broadcaster is able to clear such periods, unless the advertiser refuses to accept such postponement of broadcasting on the Station.

If the Broadcaster fails or refuses to accept said program or programs or if the Broadcaster is unable to clear the required period or periods of time and Mutual is unable

[fol. 408] to persuade the advertiser to use a substitute period or periods or to postpone the commencement of such programs on the Station, as provided in the preceding sub-paragraphs, Mutual may contract with any other station located in said city for the broadcasting of said commercial program or programs.

(B) In the case of a single sustaining program or series of sustaining programs:

(1) If the Broadcaster is unable to clear the required period or periods of time for such program or programs but notifies Mutual that the Broadcaster will broadcast the program or programs by transcription at a mutually satisfactory substitute period or periods, Mutual will not offer said program or programs to any other station in said city; and

(2) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs, Mutual, in offering said series of programs to any other station in said city, will offer said series subject to recapture by the Station on one (1) week's notice to Mutual.

It is understood, however, that notwithstanding the foregoing, Mutual may make available to any other station in said city special sustaining programs of great public importance (such as, but not limited to, addresses of the President of the United States).

3. Mutual will use its best efforts to secure contracts from advertisers for the broadcasting of commercial programs through the Station, as well as through all other stations regularly affiliated with Mutual, but Mutual does not undertake to refuse any commercial programs simply because the advertiser refuses to purchase coverage in the city in which the Station is located. The Broadcaster will sell broadcasting time on the Station to Mutual for broadcasting commercial programs, and will broadcast such programs through the Station, on the following terms and conditions:

(A) The Broadcaster hereby grants to Mutual an option on the periods of time on the Station specified in Exhibit A hereto attached, hereinafter called the "Mutual option time". This option shall be exclusive, except as

against other network organizations, it being understood that the granting of this option to Mutual shall not prevent or hinder the Broadcaster from optioning (under nonexclu- [fol. 409] sive options) or selling any or all of the Mutual option time, or other time, to other network organizations. The Broadcaster will clear and furnish to Mutual any period or periods of time within the Mutual option time for the broadcasting of any Mutual commercial network program or programs upon fifty-six (56) days' notice from Mutual, unless prior to such notice from Mutual the Broadcaster shall have actually made a bona fide sale to another network organization of the period or periods of time required by Mutual for the advertiser. No commitment to any other network organization made in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission shall be deemed to be a bona fide sale for the purpose of this contract. The Broadcaster may refuse to execute a commitment to furnish broadcasting time to Mutual for the broadcasting of any program or programs which the Broadcaster reasonably believes to be unsatisfactory or unsuitable. (Mutual will use its best efforts to supply to the Broadcaster such information as it may request regarding any proposed program or programs.)

(B) If the period or periods of time on the Station required for broadcasting any Mutual network commercial program or programs are outside the Mutual option time and if the Broadcaster elects to sell such required period or periods of time to Mutual for the broadcasting of such program or programs, such time shall be sold to Mutual on the terms and conditions contained in the following subparagraphs of this paragraph, i.e., on the same terms and conditions as time within the Mutual option time is sold to Mutual.

(C) Mutual will charge each advertiser at the following rates, for broadcasting time on the Station furnished to such advertiser by Mutual:

(1) In order to encourage the use by advertisers of a greater number of stations affiliated with Mutual for the broadcasting of the advertiser's programs, Mutual has established special competitive volume discounts for advertisers contracting for periods of time on a substantial number of such stations. The minimum number of stations

which must be used to entitle the advertiser to such special volume discounts is, at present, 76 stations, but it is understood that Mutual may increase or decrease this minimum from time to time, if Mutual finds it necessary or desirable to do so to meet competitive conditions. Accordingly, if [fol. 410] any advertiser contracts with Mutual for periods of time on at least the number of stations then specified by Mutual as the minimum number of stations necessary to entitle the advertiser to such special volume discounts, Mutual will charge the advertiser for time on the Station at a Volume Network Rate equal to the Station's single-time rate for the period of time used on any day, in the applicable time classification, less the applicable special volume discount specified below, depending upon the number of programs broadcast by Mutual for the advertiser during a period of fifty-two consecutive weeks:

13 broadcasts—20% discount
26 broadcasts—25% discount
52 broadcasts—35% discount
104 Broadcasts—40% discount
156 broadcasts—42½% discount
208 broadcasts—45% discount
260 broadcasts—50% discount

No such special volume discount, however, will be allowed to any advertiser with respect to time purchased by the Advertiser under any contract for a term of less than thirteen consecutive weeks. In computing the Volume Network rate for the programs of any advertiser, the Station's single-time rates will be deemed to be the Station's published card rates for national advertisers in effect on the date the Broadcaster executes its commitment in connection with such advertiser's programs, or the single-time rates then charged or quoted by the Broadcaster to national advertisers for time on the Station, if such rates are lower than the Station's published card rates. (It is understood that if the advertiser uses two or more fifteen-minute units on any day, the total daily amount of time used by the advertiser may, for the purpose of determining the single-time rate to be used in computing the charges to the advertiser, be treated as an uninterrupted period, and, if two or more fifteen-minute units used by the advertiser fall in different time classifications, the single-time rates in such classifications will be averaged. Any advertiser

that shall have completed two hundred sixty broadcasts during a period of fifty-two successive weeks of broadcasting at the Volume Network Rate and shall continue such broadcasting without interruption shall be entitled to receive the Volume Network Rate for 260 broadcasts for the [fol. 411] additional period of successive weeks during which the advertiser uses the same periods of time.

(2) Mutual will charge ~~any other advertiser~~ for time on the Station at the Station's rates for such time in effect on the date the Broadcaster executed a commitment in connection with such advertiser's program or programs, less the applicable discounts customarily allowed by the Broadcaster to advertisers.

These rates will, of course, be subject to the customary 15% agency commission to recognized advertising agencies. The term "advertiser" as used in this contract shall mean the advertiser or the advertising agency signing a contract for an advertiser, as the case may be.

(D) Mutual will pay the Broadcaster for all broadcasting time used by Mutual on the Station a net sum equal to Mutual's actual receipts from advertisers for such time, at the rates specified in paragraph (A) above, less the sum of the following:

(1) —% of such receipts from advertisers;
(2) Line and service charges of $——— per month;
( ) License fees payable by Mutual to the American Society of Composers, Authors and Publishers and other copyright licensing organizations with respect to the broadcasting through the Station of Mutual commercial and sustaining network programs.

If Mutual is, for any reason, unable to collect the entire amount billed to any advertiser (or its advertising agency) for broadcasting time on all participating stations, the receipts for time on the Station will, of course, be deemed to be a pro rata share of the amount actually collected, the share to be allocated to the Broadcasting depending upon the number of stations broadcasting said programs, the respective time charges of such stations, and the interruptions and appropriations occurring with respect to said programs.

(E) Mutual will furnish a monthly statement to the Broadcaster on or before the last day of each month setting forth the above accountings with respect to the preceding month, and will accompany such statement with the sum, if any, due the Broadcaster.

(F) The Broadcaster will sign a commitment in the form attached hereto in connection with each advertiser's pro- [fol. 412] gram or programs submitted by Mutual and accepted by the Broadcaster and, when Mutual consummates its contract with the advertiser, Mutual will sign and return the commitment to the Broadcaster. Unless Mutual gives the Broadcaster written notice that it desires to terminate the commitment, any commitment (for the sale by the Broadcaster and the purchase by Mutual of time on the Station) which is in force at the date of the termination of this contract shall not be affected in any manner by such termination of this contract, except that thereafter Mutual, in computing its payments to the Broadcaster for such time, shall only be entitled to deduct from Mutual's receipts for such time the percentages and license fees specified in paragraph (D) above, and the actual cost of the temporary line facilities necessary to deliver the advertiser's programs to the Broadcaster.

(G) Notwithstanding the execution of a commitment by the Broadcaster to broadcast any advertiser's program or programs as hereinabove provided, the Broadcaster may refuse to broadcast any such program which, in its opinion, is contrary to the public interest or the Broadcaster may substitute for any such program a program of outstanding local or national importance. The Broadcaster will give Mutual as much notice of the Broadcaster's intention to refuse any program or to substitute another program as circumstances permit.

(H) If for any reason the Broadcaster shall enter into a contract with any advertiser for the broadcasting of any Mutual program (i.e., a program being transmitted over the Mutual lines) under the provisions of which the Broadcaster, instead of Mutual, shall receive the payments made by the advertiser for broadcasting time on the Station, the receipts of the Broadcaster from such advertising shall (for the purpose of determining the amount of the deductions provided in paragraph (D) above, but for no other pur-

pose) be deemed a part of Mutual's receipts from advertisers for broadcasting time on the Station.

4. If Mutual's receipts from advertisers for time on the Station for any month shall not equal the sum of the deductions provided in paragraph (D) above for such month, the Broadcaster will pay Mutual the deficiency promptly upon the receipt of a statement from Mutual of such deficiency. To secure the prompt payment of any such deficiencies, the Broadcaster will maintain the sum of $——— [fol. 415] on deposit with Mutual. Such deposit, if not theretofore exhausted, shall be applied to the payment of any deficiency for the last month of this contract. Any portion of such deposit not so applied shall be refunded to the Broadcaster by Mutual upon the termination of this contract.

5. Mutual agrees to use its best efforts to obtain from its various affiliated stations and to otherwise develop sustaining programs of high quality, including: broadcasts of national and international events, speeches by national and international figures in the fields of government, education, religion, agriculture, and the arts, broadcasts of operas, symphony concerts, and other musical events, dramatic presentations and other educational or entertainment programs of general interest, for broadcasting by the stations composing its network. So long as the Broadcaster shall faithfully perform all of its agreements herein contained, Mutual will transmit to the Broadcaster for broadcasting by the Station such Mutual sustaining programs as may from time to time be transmitted over Mutual's Chicago-——— line, unless Mutual is prevented from so doing by causes beyond its control, or unless such transmission might involve Mutual or the originating station in a labor dispute. The Broadcaster shall not, without the prior consent of Mutual, broadcast any of these programs as sponsored programs or in any other manner use any of these programs or permit them to be used for commercial purposes, shall not furnish any of these programs to any other station, shall not make any transcription or recording of any of these programs, except for delayed broadcasting on the Station, and shall not consent to the rebroadcasting of any of these programs by any other station. The Broadcaster agrees to make available to Mutual, for transmission to the other stations affiliated with the Mutual network, the outstanding

sustaining programs produced or developed by the Broadcaster.

6. The Broadcaster agrees that during the term of this contract it will not enter into any contract with any person, firm or corporation wherein the Broadcaster agrees to broadcast programs through the Station exclusively for any other network or wherein the Broadcaster gives such network any exclusive option on, or exclusive priority rights over, any broadcasting time on the Station. The Broad- [fol. 414] caster further agrees that it will not discriminate against Mutual and in favor of any other network organization in the sale of its broadcasting time, in that, if it sells broadcasting time to any other network organization, it will, in acting upon requests for the same period of time from Mutual and such other network organization, adhere to the principle of first-come-first-served. The Broadcaster further agrees that it will not make any commitment with respect to any period or periods of time on the Station to any other network organization in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission. If the Broadcaster shall enter into any contract or agreement with any other network organization or shall enter into any contract or agreement with any person, firm or corporation for the broadcasting of any program to be transmitted to the Station by any other network organization, the Broadcaster agrees to furnish Mutual with a true and complete copy of such contract or agreement within five (5) days after it is executed or made. The Broadcaster further agrees to give Mutual written notice of any sale of broadcasting time on the Station within the Mutual option time made to any other network organization, pursuant to any such contract or agreement. Such notice shall be given to Mutual by the Broadcaster within five (5) days after the commitment to furnish the broadcasting time is made by the Broadcaster and shall specify the period or periods of time to be furnished, the date or dates upon which such period or periods are to be furnished, the network organization to which such period or periods are to be furnished, the advertiser whose program or programs are to be broadcast during said period or periods and the compensation to be received by the Broadcaster for said period or periods.

7. This agreement shall, unless sooner terminated as hereinafter provided, remain in effect for a period of — years, ending —— —, 194—, and shall then be renewed on the same terms and conditions for a further period of —— years, and so on for successive further periods of —— years each, unless and until either party shall, at least —— days prior to the expiration of the then current term, give the other party written notice that it does not desire to have the contract renewed for a further period.

8. If any of the licensees of radio stations contributing to the cost of Mutual's program transmission line extend- [fol. 415] ing to —— —— shall cease to make such contributions, Mutual may give written notice to the Broadcaster of Mutual's desire to terminate this contract, such notice to be given by registered mail at least thirty (30) days prior to the date upon which Mutual proposes that the termination shall become effective. This contract will terminate on the effective date specified in Mutual's notice, unless the Broadcaster shall, within ten (10) days after the date of Mutual's notice, deliver to Mutual a binding agreement by the Broadcaster to pay to Mutual, during the remainder of the term of this contract, an additional amount each month equal to the contributions theretofore made by the licensee or licensees ceasing to make such contributions.

9. If the ownership or control of the Station or of the controlling interests in the capital stock of the Broadcaster shall be voluntarily or involuntarily transferred from its present holder or holders, Mutual may terminate this contract by giving written notice to the Broadcaster by registered mail at least thirty (30) days prior to the date upon which such termination is to become effective.

10. The Broadcaster agrees that it will not use the name "Mutual Broadcasting System" or any similar name, except pursuant to the terms and conditions of this contract and in a manner consistent with its provisions.

11. It is understood and agreed that neither of the parties is the agent or representative of the other for any purpose whatsoever and that no partnership relationship exists between the parties.

12. This agreement is subject to all present and future rules, regulations, and orders of the Federal Communica-

tions Commission and to all laws of the United States of America now or hereafter in force.

In Witness Whereof, the parties hereunto have executed this contract, or have caused it to be executed by their duly authorized officers, as of the day and year first above written, on the respective dates indicated after their signatures.

MUTUAL BROADCASTING SYSTEM, INC.
By ....
Date ....

....
By ....
Date ....

APPENDIX F

Summary of Available Full-Time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage[1]	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
Ten or More Full-time Commercial Stations					
New York, N. Y.[2]	11,690,520	1	6	14	3
Los Angeles, Cal.	2,904,596	3	8	13	4[3]
Nine Full-time Commercial Stations					
Chicago, Ill.[2]	4,499,126	2	5	9	5
San Francisco-Oakland, Cal.	1,428,525	9	8	9	3
Eight Full-time Commercial Stations					
Boston, Mass.[2]	2,350,514	5	6	8	3
Seven Full-time Commercial Stations					
Philadelphia, Pa.[2]	2,898,644	4	5	7	3
Six Full-time Commercial Stations					
Detroit, Mich.[2]	2,295,867	6	3[4]	6[4]	3
Washington, D. C.[2]	907,816	13	4	6	3
Kansas City, Kans.-Kansas City, Mo.[2]	634,093	18	5[5]	6[4]	3[6]
Seattle, Wash.	452,639	24	5	6	3
Five Full-time Commercial Stations					
Pittsburgh, Pa.[2]	1,994,060	7	4[6]	5	3
St. Louis, Mo.[2]	1,367,977	8	4	5	3
Baltimore, Md.[2]	1,046,692	11	3	5	3
Minneapolis-St. Paul, Minn.[7]	911,077	12	4	5	3
Buffalo-Niagara Falls, N. Y.[2]	857,719	14	3	5	4[8]
Cincinnati, O.[2]	789,309	16	4	5	3
New Orleans, La.	540,030	20	3	5	3

[fol. 417]

Portland, Ore.	406,406	30	4	5	3
Denver, Colo.	384,372	32	4	5	3
San Antonio, Tex.	319,010	42	2	5	2
Four Full-time Commercial Stations					
Providence, R. I.[9]	711,500	17	0[9]	4	3
Scranton-Wilkes-Barre, Pa.	629,581	19	0	4[10]	1[10]
Hartford-New Britain, Conn.[9]	502,193	22	2	4	3
Indianapolis, Ind.[9]	455,357	23	4	4	3
Atlanta, Ga.	442,294	25	3	4	3
Louisville, Ky.[11]	434,408	26	2	4	3
Albany-Schenectady-Troy, N. Y.[9]	431,575	27	1	4	3
Springfield-Holyoke, Mass.[12]	394,623	31	2	4	2
Dallas, Tex.	376,548	33	4[14]	4[14]	3[14]
Memphis, Tenn.	332,477	39	3	4	3
Syracuse, N. Y.[13]	258,352	48	4	4	2
Oklahoma City, Okla.	221,229	53	4	4	3
Tampa-St. Petersburg, Fla.	209,693	56	4	4	3
Fort Worth, Tex.	207,677	57	4[14]	4[14]	3[14]
Tacoma, Wash.	156,016	76	2	4	0
Spokane, Wash.	141,370	84	3	4	3

APPENDIX F—Continued

Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage[1]	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
Three Full-time Commercial Stations					
Cleveland, O.[9]	1,214,943	10	3	3	3
Milwaukee, Wis.	790,336	15	3	3	3
Houston, Tex.	510,397	21	3	3	3
Rochester, N. Y.[10]	411,970	28	2	3	2
Birmingham, Ala.	407,851	29	2	3	3
Youngstown, O.	372,428	34	2	3	2
Akron, O.[10]	349,705	36	2	3	2
Worcester, Mass.[10]	306,194	44	2	3	2
Omaha-Council Bluffs, Nebr.-Ia.[11]	287,698	45	2	3	2
San Diego, Cal.	256,368	49	2	3	1
Miami, Fla.	250,537	50	3	3	3
Richmond, Va.[10]	245,674	51	3	3	3
Nashville, Tenn.	241,769	52	3	3	2
Salt Lake City, Utah	204,488	58	2	3	3
Jacksonville, Fla.	195,619	63	3	3	3
Chattanooga, Tenn.	193,215	64	1	3	2
Tulsa, Okla.	188,562	66	2	3	3
Des Moines, Ia.[1]	183,973	68	2	3	3
Duluth-Superior, Minn.-Wis.	157,098	75	3	3	2
Knoxville, Tenn.	151,829	78	3	3	2
Beaumont-Port Arthur, Tex.	138,608	85	3	3	1
Wichita, Kans.	127,308	92	3	3	2

[fol. 419]

Little Rock, Ark.	126,724	93	3	3	2
Phoenix, Ariz.	121,828	94	3	3	2
Shreveport, La.	112,225	101	3[17]	3[17]	2[17]
Springfield, Mo.	70,514	135	3	3	1
	Two Full-time Commercial Stations				
Columbus, O.[13]	365,796	35	2	2	2
Toledo, O.[13]	341,663	37	2	2	2
Lowell-Lawrence-Haverhill, Mass.	334,900	38	2	2	1
Allentown-Bethlehem-Easton, Pa.	325,142	40	1	2	1
Norfolk-Portsmouth-Newport News, Va.	323,326	41	2	2	1
Fall River-New Bedford, Mass.	272,646	46	2	2	0
Dayton, O.[13]	271,513	47	2	2	2
Bridgeport, Conn.[13]	216,621	54	1	2	1
Grand Rapids, Mich.	209,873	55	2	2	1
Wheeling, W. Va.	196,340	63	1	2	2
Wilmington, Del.[13]	188,974	65	2	2	1
Davenport-Rock Island-Moline, Ia.-Ill.[13]	174,986	70	2	2	1
Harrisburg, Pa.[13]	173,367	71	2	2	2
Huntington-Ashland, W. Va.-Ky.	170,979	72	1	2	0
Sacramento, Cal.	158,999	74	1	2	2

APPENDIX F—Continued

Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941—Continued

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage[1]	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
Two Full-time Commercial Stations (Continued)					
Waterbury, Conn.	144,822	82	1	2	1
Evansville, Ind.	141,614	83	2	2	2
Charleston, W. Va.	136,332	86	1	2	2
Fort Wayne, Ind.[13]	134,385	88	1	2	2
Erie, Pa.	134,039	89	2	2	2
Savannah, Ga.	117,970	95	2	2	2
El Paso, Tex.	115,801	96	2	2	2
Mobile, Ala.	114,906	97	2	2	2
Charlotte, N. C.	112,986	99	2	2	1
Roanoke, Va.	110,593	102	2[15]	2[15]	2[15]
Winston-Salem, N. C.	109,833	104	2	2	1
Portland, Me.[16]	106,566	105	2	2	1
Atlantic City, N. J.	100,096	108	2	2	2
Charleston, S. C.	98,711	109	2	2	1
Fresno, Cal.	97,504	110	2	2	2
Montgomery, Ala.	93,697	111	2	2	2
Columbia, S. C.	89,555	114	2	2	2
Springfield, Ill.	89,484	115	2	2	2
Lincoln, Nebr.[13]	88,191	116	2	2	1
Jackson, Miss.	88,003	117	2	2	1
Augusta, Ga.	87,809	118	2	2	2

[fol. 421]

Sioux City, Ia.	87,791	119	2	2	1
Manchester, N. H.	81,932	122	2	2	2
Asheville, N. C.	76,324	128	2	2	2
Macon, Ga.	74,830	129	2	2	1
Corpus Christi, Tex.	70,677	134	2	2	1[19]
Amarillo, Tex.	53,463	140	2	2	1
Raleigh, N. C.	46,897	162	2[20]	2[20]	1[20]
Dubuque, Ia.	43,892	173	2	2	1
Tucson, Ariz.	36,818	223	2	2	2
Orlando, Fla.	36,736	225	2	2	2
Albuquerque, N. M.	35,449	232	2[21]	2[21]	2[22]
Santa Barbara, Cal.	34,958	236	2	2	1
Greenville, S. C.	34,734	237	2	2	1
Bangor, Me.	29,822	289	2	2	2
Bakersfield, Cal.	29,252	293	2	2	1
Hot Springs, Ark.	21,370	383	2	2	1
Albany, Ga.	19,055	432	2	2	1

One Full-time Commercial Station

New Haven, Conn.	308,228	43	0	1	0
Canton, O.	200,352	59	1	1	0
Trenton, N. J.	200,128	60	1	1	0

APPENDIX F—Continued

Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941—Continued

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage[1]	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
One Full-time Commercial Station (Continued)					
Utica-Rome, N. Y.	197,128	61	1	1	1
Flint, Mich.	188,554	67	1	1	1
Reading, Pa.	175,355	69	1	1	1
Peoria, Ill.	162,566	73	1	1	1
Saginaw-Bay City, Mich.	153,388	77	1	1	1
Johnstown, Pa.	151,781	79	1	1	1
South Bend, Ind.	147,022	80	1	1	1
Binghamton, N. Y.	145,156	81	1	1	1
Racine-Kenosha, Wis.	135,075	87	1	1	0
Lancaster, Pa.	132,037	90	1	1	1
San Jose, Cal.	129,367	91	1	1	0
Altoona, Pa.	114,094	98	1	1	1
Lansing, Mich.	110,356	103	1	1	1
Austin, Tex.	106,193	106	1	1	0
Rockford, Ill.	105,259	107	1	1	0
York, Pa.	92,627	112	1	1	1
Columbus, Ga.	92,478	113	1	1	1
St. Joseph, Mo.	86,991	120	1	1	0
Berkeley, Cal.	85,547	[a]	1	1	0
Terre Haute, Ind.	83,370	121	1	1	1
Stockton, Cal.	79,337	123	1	1	0
Madison, Wis.	78,349	124	1	1	1

[fol. 423]

Topeka, Kans.	77,749	125	1	1	1
Springfield, O.[12]	77,406	126	1	1	1
Kalamazoo, Mich.	77,213	127	1	1	1
Cedar Rapids, Ia.[11]	73,219	130	1	1	1
Greensboro, N. C.	73,055	131	1	1	1
Galveston, Tex.	71,677	132	1	1	0
Waco, Tex.	71,114	133	1	1	0
Durham, N. C.	69,683	136	1	1	1
Decatur, Ill.	65,764	138	1	1	0
Pueblo, Colo.	62,039	139	1	1	1
No Full-time Commercial Stations					
Hamilton-Middletown, O.	112,686	100	0	0	0
Waterloo, Ia.	67,050	137	0	0	0

[fol. 421]

Summary of Cities Having Population of 50,000 or More in Which National and Columbia Restrictive Contracts with Affiliates Permit No Access, or Only a Limited Access, by Mutual
(November 1, 1941)

I

Cities in order of size having a population of 50,000 or more in which Mutual has no outlet, in which Columbia or National, or both have restrictive contracts with full-time outlets, and in which no independent full-time outlet is available.

Cities in order of size having a population of 50,000 or more in which Mutual has no outlet, in which Columbia or National, or both, have restrictive contracts with full-time outlets, and in which no independent full-time outlet is available.

- Youngstown, O.
- Toledo, O.
- Dayton, O.
- Miami, Fla.
- Utica-Rome, N. Y.
- Wheeling, W. Va.
- Flint, Mich.
- Reading, Pa.
- Peoria, Ill.
- Sacramento, Calif.
- Saginaw-Bay City, Mich.
- Johnstown, Pa.
- South Bend, Ind.
- Charleston, W. Va.
- Fort Wayne, Ind.
- Erie, Pa.
- Savannah, Ga.
- El Paso, Tex.
- Altoona, Pa.
- Lansing, Mich.
- Portland, Me.
- Charleston, S. C.
- Montgomery, Ala.
- Columbus, Ga.
- Jackson, Miss.
- Augusta, Ga.
- Terre Haute, Ind.
- Madison, Wis.
- Springfield, O.
- Kalamazoo, Mich.
- Greensboro, N. C.
- Durham, N. C.
- Pueblo, Colo.
- Topeka, Kan.[illegible]
- Asheville, N. C.

II

Cities in order of size having a population of 50,000 or more in which Mutual has a local or part-time station as an outlet, in which Columbia or National, or both, have restrictive contracts with full-time regional or clear-channel outlets, and in which no full-time regional or clear-channel facilities are available.

- New Orleans, La.
- Scranton-Wilkes-Barre, Pa.[illegible]
- Hartford-New Britain, Conn.
- Atlanta, Ga.
- Louisville, Ky.
- Albany-Schenectady-Troy, N. Y.
- Rochester, N. Y.
- Columbus, O.
- Akron, O.
- Lowell-Lawrence, Mass.
- Allentown, Pa.
- Norfolk, Va.
- San Antonio, Tex.
- Oklahoma City, Okla.
- Chattanooga, Tenn.
- Wilmington, Del.
- Duluth-Superior, Minn.-Wis.
- Knoxville, Tenn.
- Little Rock, Ark.
- Mobile, Ala.
- Roanoke, Va.
- Winston-Salem, N. C.
- Sioux City, Iowa
- Lincoln, Neb.
- Macon, Ga.
- Amarillo, Tex.

III

Cities in order of size having a population of 50,000 or more in which Mutual has as an outlet a station also used by another major network, in which Columbia or National, or both, have restrictive contracts with or own full-time regional or clear-channel outlets, and in which:

(a) There is no full-time independent station available.

Cleveland, O.	Binghamton, N. Y.
Houston, Tex.	Evansville, Ind.
Birmingham, Ala.	Lancaster, Pa.
Richmond, Va.	Charlotte, N. C.
Salt Lake City, Utah	York, Pa.
Jacksonville, Fla.	Columbia, S. C.
Tulsa, Okla.	Manchester, N. H.
Des Moines, Ia.	Cedar Rapids, Ia.
Harrisburg, Pa.	

(b) The only independent full-time outlet available is a local station;

Memphis, Tenn.	Spokane, Wash.
Omaha, Nebr.	Corpus Christi, Tex.
Bridgeport, Conn.	

Footnotes

[1] Although the determination of the number of full-time stations having adequate coverage throughout the various metropolitan areas presents several problems (due principally to doubts as to whether the low power local stations have adequate coverage), liberality has been exercised, and where doubt exists, the doubt has been resolved, in most instances, in favor of adequate coverage. In the preparation of this appendix, outstanding construction permits have been considered as authorizing operation in accordance therewith.

[2] Basic on both NBC Red and Blue, and CBS.

[3] Columbia owns KNX. KMPC is available as an alternate or additional station with KNX.

[4] These figures do not include CKLW, Windsor, Canada, Mutual's Detroit outlet. This station, which prior to 1935 was a Columbia affiliate, is used by Mutual because of the insufficient number of full-time stations having adequate coverage of the Detroit Metropolitan District.

[fol. 426]

Footnotes—Continued

[5] These figures include WREN, the NBC basic Blue network outlet. With the exception of one-half hour on weekdays from 2:30 to 3:00 p.m., WREN operates unlimited time.

[6] The coverage of all Pittsburgh stations, with the exception of KDKA, is doubtful because of the size of the Pittsburgh Metropolitan District.

[7] Basic on both NBC Red and Blue.

[8] Two stations are affiliated with Columbia, WGR and WKBW.

[9] Although the stations in this district adequately cover the cities in which they are located, it is doubtful whether their coverage is adequate for the entire metropolitan district. The only full-time station not affiliated under restrictive contracts with National or Columbia is WFCI in Pawtucket, R. I., a city adjacent to Providence.

[10] The Columbia station is WGBI, a station sharing time with WQAN.

[11] Basic on NBC Red and CBS.

[12] Basic on CBS.

[13] Basic on NBC Blue.

[14] These figures include KRLD and KGKO.

[15] Basic on NBC Blue and CBS.

[16] Basic on NBC Red.

[17] These figures include KWKH, 50 kw.

[18] This includes WBT, 50 kw.

[19] KRIS, a regional station, is affiliated with the Red and Blue networks of National. The same station is also used by Mutual. KEYS, a local station, has only recently been authorized to operate.

[20] This station is WPTF, 50 kw.

[21] This includes KOB, 50 kw

[22] These cities are not large enough to be classified as metropolitan districts, and are included because of the presence of more than one full-time commercial station.

[23] Berkeley is not listed as a metropolitan area; it would rank 121st in population.

[24] Columbia affiliate, operates part-time.

[25] WGBI, the Columbia affiliate, shares time with WQAN but uses most of the available time.

[fol. 427] APPENDIX G

First Cancellation of the Ballantine Program

J. Walter Thompson Company

420 Lexington Avenue,
New York,
October 23, 1941.

Mr. Sidney P. Allen, Mutual Broadcasting System, 1440 Broadway, New York City.

DEAR MR. ALLEN:

We regret that it is necessary to send you the attached cancellation of the Ballantine program. However, as discussed over the telephone we plan to move the program from the Mutual Network after the broadcast of Friday, October 31.

Whenever you are able to discuss shortrate and payment details, please let me know.

Sincerely yours, J. Walter Thompson Company, (S.) Linnea Nelson.

L. Nelson: AW.

J. Walter Thompson Company

420 Lexington Avenue,
New York.

Radio Suspension Order

October 23, 1941.

Mutual Broadcasting System, 1440 Broadway, New York City.

GENTLEMEN: Re: P. BALLANTINE & SONS:

Kindly cancel broadcasting ordered for the above client as follows:

One-half hour—9:30 to 10:00 P. M. New York Time.
44 times—once a week—every Friday.
November 7, 1941 to and including September 4, 1942.

Over Mutual coast-to-coast Network—77 stations.
There is to be no broadcasting after October 31, 1941.

[fol. 428] This was ordered on June 24, July 29, August 21 and September 12, 1941.

Kindly sign and return the enclosed copy.

J. Walter Thompson Company, Per (S.) Linnea Nelson.

Appendix H

Final Cancellation of the Ballantine Program

J. Walter Thompson Company

420 Lexington Avenue,
New York,
October 27, 1941.

Mr. Sidney P. Allen, Mutual Broadcasting System, 1440 Broadway, New York City.

Dear Mr. Allen:

Attached is radio suspension order dated October 27th, which cancels and supersedes the one previously given you dated October 23rd.

Won't you please return the October 23rd copy unsigned and the October 27th copy with signature.

Sincerely yours, J. Walter Thompson Company, (S.) Linnea Nelson.

L. Nelson: AW.
cc: Mr. Wood.

J. Walter Thompson Company

420 Lexington Avenue,
New York.

Radio Suspension Order

October 27, 1941.

Mutual Broadcasting System, 1440 Broadway, New York City.

Gentlemen: Re: P. Ballantine & Son:

Kindly cancel broadcasting ordered for the above client as follows:

One-half hours—9:30 to 10:00 P. M. New York Time.

[fol. 429] 39 times—once a week—every Friday.
December 12, 1941 to and including September 4, 1942.
Over Mutual coast-to-coast Network—77 stations.
There is to be no broadcasting after December 5, 1941.
This was ordered on June 24, July 29, August 21 and September 12, 1941.
Kindly sign and return the enclosed copy.
J. Walter Thompson Company, Per (S.) Linnea Nelson.

Appendix I

Excerpts from Trade Journals on Loss of Ballantine Program

Broadcasting.
October 27, 1941.
Page 50.

Ballantine Quits Mutual for Blue

P. Ballantine & Sons, Newark brewer, is shifting its *Three Ring Time* series from MBS to NBC-Blue, beginning on the latter network Nov. 7. Series, starring Charles Laughton, Milton Berle and Bob Crosby's orchestra, will be broadcast for 52 weeks on more than 20 Blue stations, Fridays, 8:30-9 p. m., a half-hour earlier than its present Friday evening spot on MBS.

Agency in charge of the account, J. Walter Thompson Co., New York, had nothing to say about plans for a substitute program on MBS for the duration of the contract with that network, which runs until mid-December.

In accepting the Ballantine program, NBC-Blue is deviating from the NBC code of policies and standards, which states that "alcoholic beverages may not be advertised on any network program," although individual NBC M & O stations have accepted beer advertising for local broadcasts. When this prohibition was adopted early in 1939, NBC explained that network programs must be acceptable to all parts of the country and at all times, whereas beer advertising was acceptable in some communities but not in others and was much more acceptable at some times than at others.

[fol. 430] Variety.
October 29, 1941.
Page 31.

Mutual-NBC Beer Brawl

Bitter Charges on NBC's Ways

One of Radio's Name-Calling Competitive Situations Develops as Blue Wins Account—Ballantine Will Finish 13-Week Cycle, However

"Fly" in the Suds

Radio was faced last week with one of its bitterest competitive squabbles when the J. Walter Thompson agency disclosed that the Ballantine program was switching suddenly from the Mutual Network to the NBC Blue. The furor subsided Monday (26) as NBC took the position that it would prefer to have Ballantine complete its present 13-week cycle on Mutual and that it did not want to be a party to an account's abrupt walkout from a competitive network under the circumstances that prevail.

The sudden dissipation of the proposed immediate transfer was preceded by a vigorous bombardment of charges from Mutual, with the Blue network the principal target. That the event possessed hasty litigation and publicity possibilities was immediately apparent to all when Mutual accused NBC of going to the extreme of reversing its own policy against beer advertising to wean away the account, of giving guarantees to the agency and the account against any action for damages, and of taking the program from stations presently receiving it through Mutual only to feed it back a half-hour earlier the same night at 40% less compensation to the station. The guarantee angles were stoutly denied by both NBC and the Thompson agency.

MBS' Fear

Charges of "dirty pool" were especially stressed by Mutual because of its fear that the blow will be used by rival radio salesmen and echoed by the thoughtless, including radio and other columnists, as a disparagement of Mutual. The Ballantine program with Charles Laughton, Milton Berle, Shirley Ross and Bob Crosby, was not only an important account financially but brought Mutual a name-[fol. 431] studded cast, something extremely vital to its expansion and prestige.

The Ballantine blow was followed by rumors that NBC would go even further in competitive appeals to Coca Cola,

the second big name-studded series which Mutual lined up for this season. This program has not yet begun broadcasting. Both NBC and CBS tried desperately to land the Coca-Cola contract but failed, because in some measure ASCAP music was unavailable on NBC and CBS and was available on Mutual. Personal acrimonies growing out of earlier phases of the ASCAP situation also played a part.

Sudden switch of the Ballantine Beer program may also become embroiled as an issue in the current controversy over the Federal Communications Commission's new regulations on network broadcasting. The Mutual management and legal staff have held several huddles on the matter but no decision has been made as to what trend the web's loss of the Ballantine business will take.

J. Walter Thompson, agency on the Ballantine account, had announced that the show will move into the Blue's Friday 8:30 to 9 p. m. spot Nov. 7. It would have made the first time a program had been transferred from one network to another (competitive) within the initial 13-week cycle. Acceptance of the Ballantine account involves a drastic reversal in policy on the part of NBC. Latter network had been offered the business before the program went on Mutual five weeks ago but NBC at the time refused to budge from the policy tabooing beer which has been in effect since 1936. Other recent revisions of NBC policies, but all of which have been confined to the Blue link concern the acceptance of laxative accounts and the use of recordings over a hookup.

Says Thompson

In defending its position the Thompson agency pointed out last week that the move was in line with an understanding it had with NBC at the time the agency failed to obtain facilities on the Blue for Ballantine. According to the agency, NBC was informed that if it ever changed its policy on beer to let Thompson know immediately.

Thompson got the word from NBC last Tuesday (21) and, according to the Mutual version, was given 48 hours in which to turn in an order for the Friday evening period. [fol. 432] The agency asked Mutual for a release from its contract, which covered 52 weeks but bound the account only for 13 weeks, but Mutual not only turned down the request but advised Thompson that the account would be held liable for the billings entailed in the remaining five.

weeks of the 13-week cycle. This obligation amounts to $45,800. Ballantine's appropriation for time over the 52 weeks is $200,000.

When Thompson, according to Mutual, asked for the release it gave as its reason for switching networks the fact that the Ballantine program had been dropped by the Blue's affiliates in Providence, Cleveland, Bridgeport and Jacksonville. Mutual took the matter up with Ballantine Friday (24) and the account stated that it would go along with the agency on the proposition. The last ratings on the Ballantine show have been 2.9 on the Co-operative Analysis of Broadcasting and 4.8 on the C. E. Hooper reports.

Variety.
October 29, 1941.
Page 38.

The Radio Trade is Discussing: Mutual's loss of its one big Coast show to NBC, the Ballantine aler, and the expectation that other beer accounts may go NBC.

Appendix J

Excerpt from Trade Journal on March of Time Program

Broadcasting.
October 13, 1941.
Page 66.

NBC Relaxes Rule for Time Series

To cooperate with Time Inc. and Young & Rubicam in making the March of Time, which returned to the air last week as a half-Hour Thursday evening Blue Network program, as effective as possible, NBC has relaxed its rules against dramatizations of war scenes and impersonations of world figures.

Series will also on occasion utilize recordings of speeches and of songs and music necessary for authentic radio presentation of current events, although recordings are usually forbidden from the networks except as sound effects.

[fol. 433] Everything possible to make these new *March of Time* broadcasts realistic and impressive will be done, according to NBC, where it was explained that when the

sponsor is a publishing company with full realization of its responsibility to the public it is entitled to special consideration in instances where application of the customary network rules would adversely affect the program. Each such case will be considered as it arises on its own merits, it was stated, with decisions being made as necessary from week to week.

APPENDIX K

Excerpts from Trade Journals on Coca-Cola Program

Variety.
October 8, 1941.
Page 24.

Blue Expects Every Affiliate to Do Its Duty to Sterling Products

NBC station relations department disclosed last week that it proposes to have a showdown with those Blue network affiliates that pass up the two Sterling Products half-hours for the Coca Cola series which will clear through Mutual. These stations have already been given their 28-day removal notices together with a warning that NBC expects them to live up to the terms of their contract.

The Blue stations involved have guaranteed to deliver 10 p. m. across the board to Mutual for the beverage account, which starts Nov. 3. After Mutual obtained the guarantees the Blue sold the 10 to 10:30 segments, Monday and Wednesday, to Sterling with Oct. 20 the starting date.

Broadcasting.
October 13, 1941.
Page 14.

Coca Cola Series Conflicts on Blue

NBC to Hold Stations for Sterling Products Pair

Stations which are affiliated both with NBC-Blue and MBS and which have been sold as outlets for both the Coca-[fol. 434] Cola broadcasts on Mutual and the Sterling Products broadcasts on the Blue have received notice from NBC they will be expected to carry the Sterling Products programs.

In sending the 28-day removal notices to the six stations involved, NBC pointed out that the two Blue programs, *Monday Merry-Go-Round* for Dr. Lyons' toothpowder and *Melody Hour* for Bayer's aspirin, occur at 10-10:30 p. m. on Monday and Wednesday evenings respectively, which is network time, and that the stations are obliged to carry them under the terms of their affiliation contracts with NBC.

Other Disputes Solved

These programs start on Oct. 20 and 22. The Mutual Coca Cola series, to begin Nov. 3, calls for 10:15-10:30 p. m. broadcasts Monday through Friday, and 10-10:30 p. m. on Saturday. Blackett-Sample-Hummert, New York, is the agency for the programs on the Blue; D'Arcy Adv. Co., St. Louis, handles the Coca Cola advertising.

Signing of the Wednesday evening 10-10:30 program relieves NBC of the necessity of settling a dispute between R. J. Reynolds Tobacco Co. and American Tobacco Co.

Sale of the Wednesday evening spot to Sterling got NBC out of the middle of a dispute between two tobacco companies over seven Blue outlets in the West. When R. J. Reynolds Tobacco Co. moved its *Penthouse Party* to the Blue on Wednesdays, 9:30-10 p. m., it requested that these stations be removed from the schedule of the Kay Kyser show, broadcast 10-11 p. m. Wednesdays, sponsored by American Tobacco Co. for Lucky Strikes, under the NBC rule prohibiting continuous brodcast of competitive products. Latter program is a Red Network show, but used the Blue stations in the Western cities as supplementary outlets. When Sterling bought the Blue network 10-10:30 and preempted these stations, the contiguity was removed, automatically ending the dispute.

[fol. 434a] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Affidavit of HOPE H. BARROLL, JR., Executive Vice President of Baltimore Radio Show, Inc., Licensee of Station WFBR, Baltimore, Maryland, in Opposition to Motions for Preliminary Injunction.

CITY OF WASHINGTON,
District of Columbia, ss:

Hope H. Barroll, Jr., being duly sworn, upon oath deposes and says:

1. *Deponent.* I am General Manager of Station WFBR, Baltimore, Maryland, and am Executive Vice President of the Baltimore Radio Show, Inc., the company owning and [fol. 434b] operating Station WFBR. I have been connected with Station WFBR in an executive capacity since 1933 and have intimate knowledge of the operation of a station affiliated with national network companies. I am familiar with the bills of complaint and motions for a preliminary injunction filed by plaintiffs in Civil Actions 16-178 and 16-179, together with the affidavits of plaintiffs' officers in support thereof. This affidavit is filed in opposition to plaintiffs' motions for a preliminary injunction.

As the active head of a network station operating in a large metropolitan area I have knowledge of the problems connected with the network broadcasting industry, and particularly with the operations and business practices of the National Broadcasting Company, Inc., and the Mutual Broadcasting System, Inc. I am also familiar with the regulations promulgated by the Federal Communications Commission in "In the Matter of the Investigation of Chain Broadcasting" (Docket 5060 and testified before the Senate Interstate Commerce Committee on June 20, 1941 in opposition to the adoption of the so-called White Resolution (S. Res. 113, 77th Cong., 1st Sess.) directing a study of the rules and regulations of the Federal Communications Commission pertaining to network broadcasting.

2. *Network Affiliation of Station WFBR.* From 1931 to October 1, 1941 Station WFBR was affiliated with the National Broadcasting Company, Inc. and was a basic station

on the Red network operated by that company. On the latter date the station's affiliation with National Broadcasting Company, Inc. was terminated and it became an affiliate, with an option to purchase stock, of the Mutual Broadcasting System, Inc. under circumstances explained below.

3. *Permanent Assets of Station WFBR.* The permanent assets of Station WFBR have a present or depreciated value of $177,488.83. The original cost of these assets was $256,214.83.

[fol. 434c] 4. *The Option Time Clauses in Contracts between National Broadcasting Company, Inc. and Affiliates.* One of the effects of the network option time clauses in contracts between National Broadcasting Company, Inc. and its affiliates is to prevent stations from broadcasting programs of outstanding local interest during the desirable hours producing maximum listener response. Prior to October 1, 1941, the National Broadcasting Company, Inc. pursuant to contract, had an option, exercisable upon 28 days' notice, upon most of the desirable broadcasting periods of Station WFBR. This option covered the following periods:

Week Days	Sundays
10 a.m. to 12 noon	1 p.m. to 4 p.m.
3 p.m. to 6 p.m.	5 p.m. to 6 p.m.
7 p.m. to 7:30 p.m.	7 p.m. to 11 p.m.
8 p.m. to 11 p.m.	

Upon 28 days' notice to the effect that National Broadcasting Company, Inc. was scheduling a network commercial program during the option periods, the licensee of Station WFBR was required to clear time for the network commercial program and discontinue local or national spot commercial programs and even local sustaining programs of outstanding importance.

An illustration of the inability of an affiliate of National Broadcasting Company, Inc. to exercise full control over its program service and of the adverse effect upon the public interest resulting from the exercise of options on stations' time by the National Broadcasting Company, Inc., is shown by the request of National Broadcasting Company, Inc. that Station WFBR broadcast the Proctor & Gamble

program. In January, 1940 Baltimore Radio Show, Inc. received a request from the National Broadcasting Company, Inc. to broadcast a commercial program for Proctor & Gamble from 9:30 to 10:00 p.m. each Friday. For two or three years prior thereto, Station WFBR had been broadcasting a recruiting program for the Maryland National [fol. 434d] Guard at the special request of Major General Milton A. Reckord, Commanding General of the 29th Division stationed at Ft. Meade. This program was broadcast every Friday from 9:45 to 10:00 p.m. Baltimore Radio Show, Inc. advised the National Brodacasting Company, Inc. that as it considered the National Guard program to be more in the public interest than the Proctor & Gamble program and as the schedules for the programs conflicted, the station would be unable to broadcast the Proctor & Gamble commercial program. I received a letter in reply from Mr. William S. Hedges, vice president of the National Broadcasting Company, Inc., stating that our scheduling of the National Guard program was "grossly unfair" in that the licensee had scheduled it in network option time, complaining of the lack of cooperation rendered by the licensee to the network, and threatening to shift Station WFBR from the profitable Red network with which it had been affiliated since 1931 to the Blue network. This letter from Mr. Hedges reads as follows:

"January 25, 1940.

Mr. Hope H. Barroll, Jr., General Manager, Radio Station WFBR, Baltimore, Maryland.

Dear Hope:

Commercial Traffic has given me a copy of your wire in which you refuse to accept P&G Friday 9:30-10:00. If the Maryland National Guard program is of such transcendent importance, why don't you use your own time for it? That was the reason why time of affiliates was divided between network optional time and station time. We have always been willing to step aside for important local broadcasts which come up from time to time, but I think it is grossly unfair for you to set up a permanent schedule in network optional time for something which you should handle in your own station time.

[fol. 434e] I must say that I have not been at all happy with the degree of cooperation which you have extended to

NBC during the recent months. It can lead to only one conclusion, and that is that you are not happy as a member of the Red network. Maybe we can do something about that, too.

Sincerely yours, (S.) Bill. William S. Hedges."

On February 15, 1940, I replied to Mr. Hedges' letter and attach hereto as Exhibit "A" a copy of my reply.

The position taken by the National Broadcasting Company, Inc. resulted in the license of Station WFBR moving the National Guard program to a less desirable period. This shift meant a loss of a great part of the audience which had become accustomed to listening to this program from 9:45 to 10:00 p. m. The Proctor & Gamble program is the same program which previously had been scheduled for the period from 7:00 to 7:30 p. m. on Saturdays. The Baltimore Radio Show, Inc. had not been able to clear this time due to the fact that another sustaining program concerning the City Health Department had used that spot for several years. The offer of the licensee of Station WFBR to record the Proctor & Gamble program and broadcast it at another time proved unsatisfactory to the sponsor and the order was cancelled. The program was then placed on Station WBAL in Baltimore and was broadcast by that station until the decision of the sponsor to shift the program from Saturday to Friday.

If Regulation 3.105 had been in effect when the Proctor & Gamble program was offered to Station WFBR, the licensee would have been able to reject the Proctor & Gamble program and to continue to broadcast the National Guard program during its regular period. This regulation, in effect, provides that no contract between a network and its affiliates shall contain a provision preventing the affiliate from substituting a program of outstanding local import- [fol. 434f] ance for a network commercial program. Moreover, Regulation 3.104 limits the amount of option time that a national network company may have on an affiliate station, so that, in any event, a reasonable amount of time in each part of the day will remain free from network options and from any obligation thereunder.

5. *Loss of Red Network Affiliation by Station WFBR.* By reason of the operation of two networks by National Broadcasting Company, Inc., that company is in a position

to exert pressure, and does exert pressure, upon affiliates to comply with its demands under threat of being shifted from one of its networks to the other. In 1940 I learned that National Broadcasting Company, Inc. contemplated shifting Station WBAL, the regular Blue network outlet in Baltimore, to the Red network and Station WFBR to the Blue network. Shortly thereafter I had a conference with Mr. Trammell, president of National Broadcasting Company, Inc., in New York, at which conference were also present Mr. Phillip G. Loucks, one of my attorneys, and Mr. Harold Batchelder, my associate. Mr. Trammell notified us at this conference that National Broadcasting Company, Inc. had concluded arrangements to shift Station WBAL in Baltimore to the Red network as of October 1, 1941, thus requiring Station WFBR to move to the Blue network. Mr. Trammell offered to permit Station WFBR to become a basic Blue network outlet with a network rate of $300.00 per hour, which was the network rate that the licensee of Station WFBR had requested National Broadcasting Company, Inc. to charge for the station for some time. The local rate of Station WFBR had been $300.00 per hour for several years while the network rate had been $260.00. Further, National Broadcasting Company, Inc., through its president, Mr. Trammell, offered to guarantee that the compensation from National Broadcasting Company, Inc. to the Baltimore Radio Show, Inc. would be $125,000 for the first year, $100,000 for the second year and the third [fol. 434g] year guarantee would be negotiated. This offer of guaranty in connection with the Blue network, wheeras there had never been any guaranty or offer of one in connection with the Red network, was confirmed in writing by Mr. Trammell. Upon information and belief, this guaranty was made for the purpose of preventing the affiliation of Station WFBR with the Mutual Broadcasting System, Inc.

6. *Irreparable Injury to Station WFBR.* The granting of plaintiffs' motions for a preliminary injunction would cause irreparable injury to the licensee of Station WFBR. Due to the limitation in the number of full time broadcast stations rendering adequate coverage, Mutual Broadcasting System, Inc. finds it necessary in 27 cities, many of which are important markets, to transmit its network programs to a station also used by one of the other national network

companies. These stations have granted options on all or most of their desirable hours to National Broadcasting Company, Inc. or to Columbia Broadcasting System, Inc. The exercise of such options by competitive networks during periods when commercial programs of Mutual Broadcasting System, Inc., are being broadcast results either in the enforced transcribing of the Mutual programs and their broadcast at a later time or on another day or, if the advertisers are not satisfied with the presentation of their programs through recordings, the advertisers discontinue the use of the Mutual network. Similarly, many advertisers are unwilling to consider the use of the Mutual network either because of its inability to reach many important markets or its inability to assure the continued availability of the time of its affiliated stations to advertisers during the periods of time covered by their respective contracts.

The Ballantine Ale program, referred to in Mr. Weber's affidavit, is an outstanding commercial program and has been broadcast by Station WFBR since its affiliation with [fol. 4 h] the Mutual network. However, due to the exercise by National Broadcasting Company, Inc. of its options on broadcasting time of its affiliates carrying this program, which options were exercised in order to schedule a commercial program for Canada Dry Ginger Ale, a competitive beverage, the J. Walter Thompson Company, advertising agent for the Ballantine Ale program, gave notice of cancellation of the program, effective December 5, 1941. The licensee's time charges on Station WFBR for broadcasting the Ballantine Ale program during the remainder of the period covered by the contract would have amounted to $4,095.00 and the net return to the Baltimore Radio Show, Inc. if the program had not been cancelled, would have been $2,869.89.

At the present time Station WFBR broadcasts 17½ hours of Mutual commercial programs a week, and 11½ hours of the total are carried during the periods that National Broadcasting Company, Inc. has the right to exercise options on the broadcasting time of its affiliates. The contracts calling for the broadcasting of Mutual commercial programs on Station WFBR are cancellable at the end of any 13-week cycle upon four weeks' notice. As of November 1, 1941, the licensee's time charges on Station WFBR

for Mutual commercial programs presently arranged for amount to \$96,787.86, and the licensee's time charges for such programs broadcast during the periods that National Broadcasting Company, Inc. has contracted for network option time of affiliates total \$67,854.36. The net return to Baltimore Radio Show, Inc. on the former sum would be \$67,831.38 and on the latter sum \$47,554.05. A stay of the Commission's regulations will not only cause irreparable injury to the licensee of Station WFBR so far as future network business is concerned, but also will seriously jeopardize the receipt by Baltimore Radio Show, Inc. of the above-stated sum of \$47,554.05 on existing network business.

It is my information and belief that the situation with respect to irreparable injury to the licensee of Station [fol. 434i] WFBR resulting from a stay of the Commission's regulations applies equally to other affiliates of Mutual Broadcasting System, Inc., although, due to differences in rates charged advertisers by such other licensees and the number of network commercial programs broadcast, the extent of the irreparable injury in some instances will be less, and in other instances, greater than that which will be sustained by the licensee of Station WFBR.

Hope H. Barroll, Jr.

Subscribed and sworn to before me this 11th day of December, 1941. Miriam Koontz, Notary Public. My commission expires February 14, 1946. (Seal.)

[fol. 434j] Exhibit "A"

"February 15, 1940.

Mr. William S. Hedges, Vice President, National Broadcasting Company, RCA Building, New York City.

Dear Bill:

Mr. Batchelder [Vice President and Treasurer of our station] and I have just completed arrangements to move into our time the program of the Maryland National Guard, in order to clear the time from 9:30 to 10:00 P. M. on Fridays to carry the Procter & Gamble "What's My Name" program during this period. The Maryland National

Guard program is an important local sustaining program devoted to recruiting activities which we have been carrying from 9:45 to 10:00 P. M. Fridays and it has been difficult for us to arrange for the shift to other time. However, since the period involved falls within time optioned for network programs we have arranged to clear it, effective March 1, in order to comply with the terms of our agreement with you.

The Procter & Gamble program is the same program which was at one time scheduled for the period from 7:00 to 7:30 P. M., Saturdays, which time we found impossible to clear at the time due to the program of the City Health Department, another sustaining program of great local importance and one which has been on our station for several years. You will recall that we offered to record this program and broadcast it at another time but the sponsor decided not to use this delayed broadcast and you cancelled the order. The program was then placed on WBAL which apparently proved satisfactory to all concerned until this recent decision to shift the program from Saturdays to Fridays. And, as I said before, we have arranged to clear this time on Fridays in order to make this time available.

I am reviewing and explaining this situation because of the implication contained in the last paragraph of your letter of January 25 relating to the same general subject. It is not our desire to be non-cooperative, but I hasten to point out that both the City Health and National Guard programs are old programs on our station which we regard [fol. 434k] as important public services and both are eager to keep the times assigned to them. Both were assigned to their present periods when these periods were unused by your company. Their reluctance to give up these periods must be readily understood under the circumstances. However, you have a right to the time under the contract and in recognition of that right we have arranged to shift the National Guard program thus making the time available on March 1—the date the Oxydol program is to start.

We did not carry the Pot O' Gold program which you offered for reasons which we made clear to you at the time. While we were advised by our lawyers that they might be able to defend us successfully if the program were ever questioned, we did not feel that we wanted to undertake the risk of making such a defense for a program which we considered to be of doubtful public interest. However, you

will recall that even with these doubts, we expressed a willingness to carry the program on condition that your company would undertake any risks that might be involved. But no useful purpose can be served by going back over this history now, except to say that we felt then and still feel that we were within our rights in not broadcasting this particular program.

If you will examine the relationship which has existed for some years between your Company and WFBR, you will find that WFBR has been very cooperative and we ask that you take this fact into consideration before making such statements as those contained in your letter of January 25.

Yours sincerely, (S.) Hope H. Barroll, Jr., Executive Vice President."

[fol. 435] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

REPLY AFFIDAVIT OF FRANK STANTON

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss.:

Frank Stanton, being duly sworn, deposes and says:

I am the Director of Research of Columbia Broadcasting System, Inc. (hereinafter sometimes called "CBS" or "Columbia") and I have been its Director of Research since November, 1938. I am also a member of the Advisory Board of the Office of Radio Research of Columbia University. I am fully familiar with the records of the operations of Columbia and also, through available sources, with the records of operations of National Broadcasting Company, Inc. (hereinafter sometimes called "NBC") and of Mutual Broadcasting System, Inc. (hereinafter sometimes called "MBS" or "Mutual"). I am also familiar with records and statistical material and methods relating to program preferences of listeners and habits of radio listen-

ing. This affidavit is in reply to affidavits submitted herein by Mutual in opposition to the motion of Columbia for a temporary injunction.

1. Record of Sales of Network Time to Advertisers.

The Mutual Broadcasting System, which began its operations in the latter part of 1934 and which completed its first full year of operations in 1935, has shown a record of uninterruptedly expanding business during the subsequent years. The percentage increase of the gross sales of network time of Mutual compared with the percentage increase (or decrease) of gross sales of network time of CBS and the Red network and the Blue network of NBC, for each of the years 1936 to 1941, inclusive, compared in each case with the gross sales for the preceding year, is as follows:

[fol. 436] Percentage Increase (or Decrease) over Preceding Year of Gross Sales of Network Time

	MBS	CBS	Red	Blue
1936	53.1%	31.4%	16.1%	2.0%
1937	13.1	24.0	20.0	— 3.4
1938	30.4	—4.8	14.8	—10.5
1939	14.0	26.3	10.3	5.6
1940	43.1	18.8	12.8	9.4
1941	53.2	8.7	10.3	3.0
Average Increase 1936-1941	34.5%	17.4%	14.1%	1.0%

A table showing the percentage changes in the gross sales of network time for each month during this period is attached hereto as Exhibit A.

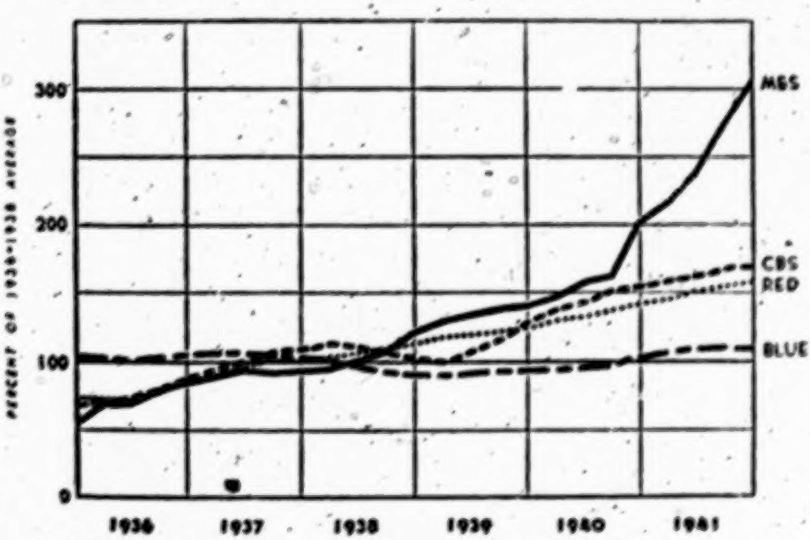
The growth of the business of Mutual compared to that of CBS and NBC is also shown by the following chart which plots the trend of gross sales of network time for Mutual compared with that of CBS and of the Red network and the Blue network of NBC.

Trend of Gross Sales of Network Time
MBS Compared with CBS, NBC-Red and NBC-Blue

Based on Preceding 12 Months' Sales at Each Plotted Month

Index: 3-Year Average, 1936-38=100%

Separately for MBS, CBS, NBC-Red and NBC-Blue



[fol. 487] The supporting tables for this chart are annexed hereto as Exhibits B, C, D, E, F, G, H and I.

The record of gross sales of network time for the years 1935 to 1941, inclusive (expressed to the nearest thousand), is as follows:

Gross Sales of Network Time
(Expressed in Thousands of Dollars)

			NBC	
	MBS	CBS	Red	Blue
1935	$1,293	$17,638	$19,499	$11,650
1936	1,979	23,168	22,646	11,878
1937	2,239	28,722	27,172	11,479
1938	2,920	27,345	31,187	10,275
1939	3,330	34,540	34,399	10,846
1940	4,767	41,026	38,800	11,863
1941	7,301	44,584	42,777	12,223

Annexed hereto as Exhibits J, K, L and M are supporting tables showing gross sales of network time for each month during this period.

Since 1935 Mutual's gross sales, expressed in percentage of gross sales of CBS and in percentage of gross sales of NBC, have greatly increased and now amount to more than twice Mutual's sales in 1935 in relation to the other networks. The record for each period is as follows:

Mutual Broadcasting System Gross Sales of Network Time Expressed as Percentage of Gross Sales

		Of NBC	
	Of CBS	Red	Blue
1935	7.3%	6.6%	11.1%
1936	8.5	8.7	16.7
1937	7.8	8.2	19.5
1938	10.7	9.4	28.4
1939	121	116	
1940	11.6	12.3	40.2
1941	16.4	17.1	59.7

From the foregoing tables and chart it is apparent that Mutual has been able to compete successfully with the other networks and this is particularly true in the case of [fol. 438] the Blue network of NBC. Mutual has been able to increase its sales from one-ninth of the Blue sales in 1935 to more than one-half of the Blue sales in 1941.

2. Number of Mutual's Affiliated Stations.

Since 1935 the number of stations affiliated with the Mutual network and regularly offered by Mutual as network outlets for advertisers has shown a steady increase each year. The number of stations so affiliated and the number affiliated with Columbia (as reported by "Radio Advertising Rates and Data" published by Standard Rate & Data Service) have been at the end of each of the years 1935 to 1940, inclusive, and at November, 1941, as follows:

	Number of affiliated stations MBS*	CBS
1935	5	98
1936	32	100
1937	77	109
1938	121	116
1939	121	116
1940	147	120
1941 (November)	178	121

* The number of stations affiliated with Mutual, as reported by the Standard Rate and Data Service, varies somewhat from the number reported by Mutual, itself. In Mutual's "Network News Weekly" for the week of December 28, 1941, Mutual reports that it has 193 stations on its network and states:

"Mutual now has 25 more stations than it had associated with it — year ago. In December, 1940, 168 stations were connected with the network. In 1939 there were 118. The network began in 1934 with four stations.

"1941 saw three of the nation's pioneer stations, WGR, Buffalo, WFBR, Baltimore, and WCAE, Pittsburgh, all 22 years old, each possessing 5,000 watts power, switch to Mutual.

"For the first time, Mutual programs were regularly heard in Florida when five outlets there joined the network.

"The total number of affiliate stations which belong to the cooperative Mutual network is now 193."

[fol. 439]

On account of expiration of affiliation contracts, each station affiliated with Columbia in 1935 has been free, one or more times during the period of Mutual's operations, to leave the CBS network and join any other network offering it a more attractive affiliation.

Frank Stanton.

Subscribed and sworn to before me this 10th day of January, 1942. George A. Burwell, Notary Public. N. Y. Co. Clk's No. 527, Reg. No. 3B800; Kings Co. Clk's No. 119, Reg. No. 3459; Bronx Co. Clk's No. 62, Reg. No. 248B43; Queens Co. Clk's No. 2167, Reg. No. 8330. Certificates filed in Westchester and Richmond Counties. Commission Expires March 30, 1943. (Notarial Seal.)

[fol. 440]

EXHIBIT "A" TO REPLY AFFIDAVIT OF FRANK STANTON

Trend of Gross Sales of Network Time, Shown by Per cent Change, Each Month, from Same Month of Preceding Year
MBS Compared with CBS, NBC-Red, and NBC-Blue
1936-1941

Month	1936 MBS %	1936 CBS %	1936 NBC Red %	1936 NBC Blue %	1937 MBS %	1937 CBS %	1937 NBC Red %	1937 NBC Blue %	1938 MBS %	1938 CBS %	1938 NBC Red %	1938 NBC Blue %
January	+143.1	+ 7.5	− 5.3	−10.8	+35.4	+25.1	+37.7	+21.9	+25.2	+21.1	+10.9	− 0.7
February	+143.8	+15.4	− 0.9	− 2.7	+43.2	+18.6	+33.9	+ 0.5	+10.3	+18.4	+10.2	− 3.0
March	+103.2	+18.7	+ 1.9	− 2.0	+29.3	+17.9	+32.2	− 3.6	− 5.7	+18.5	+ 8.1	− 1.2
April	+ 18.6	+20.8	+ 6.1	− 4.1	+42.9	+31.4	+30.8	− 0.6	− 5.0	− 5.4	+ 6.7	−12.5
May	+ 17.1	+36.0	− 1.6	− 9.5	+19.2	+46.3	+37.0	+ 4.5	+25.2	− 4.6	+16.2	−17.5
June	+ 15.4	+40.9	− 1.3	− 4.5	+11.4	+64.8	+48.3	− 4.7	+72.6	−14.4	+15.4	−18.0
July	+ 74.6	+42.1	+14.7	+ 1.7	− 7.3	+53.8	+25.2	−15.7	+63.7	−31.2	+17.7	−15.7
August	+ 69.4	+40.3	+22.8	+14.8	−20.5	+58.6	+84.7	−20.5	+70.1	−27.2	+13.1	−17.1
September	+103.6	+69.2	+55.1	+ 1.6	−21.3	+10.3	+ 3.3	−11.2	+50.4	−21.0	+16.5	−26.6
October	+ 51.1	+42.7	+33.2	+32.7	−12.1	− 9.1	− 8.1	−12.7	+45.6	− 4.7	+25.9	−12.7
November	+ 31.8	+41.1	+45.1	+ 6.4	+13.2	+ 9.2	− 4.9	+ 3.0	+39.9	− 7.6	+25.7	− 6.5
December	+ 10.3	+29.0	+33.8	+ 5.0	+26.9	+14.5	+ 4.8	− 3.2	+37.6	− 9.3	+12.5	− 6.3
Total	+ 53.1	+31.4	+16.1	+ 2.0	+13.1	+24.0	+20.0	− 3.4	+30.4	− 4.8	+14.8	−10.5

Example: In January 1936, gross time sales of the Mutual Broadcasting System were 143.1% above January 1935, while sales of CBS increased 7.5%, NBC-Red decreased 5.3% and NBC-Blue decreased 10.8%.

EXHIBIT A (Continued)

Month	1939 MBS %	1939 CBS %	1939 NBC Red %	1939 NBC Blue %	1940 MBS %	1940 CBS %	1940 NBC Red %	1940 NBC Blue %	1941 MBS %	1941 CBS %	1941 NBC Red %	1941 NBC Blue %
January	+17.5	− 7.2	+11.3	− 4.9	+ 1.0	+33.7	+13.7	− 2.8	+ 58.9	+ 9.3	+ 7.5	+10.2
February	+ 8.2	− 5.1	+ 9.5	+ 1.3	+22.0	+31.0	+13.0	+ 2.7	+ 30.8	+ 5.2	+ 2.0	+ 9.5
March	+31.8	− 3.6	+11.8	+ 3.8	+27.4	+20.1	+ 4.0	+ 1.0	+ 31.5	+11.2	+11.7	+ 5.6
April	+38.4	+17.7	+ 8.5	+ 4.8	+38.0	+16.4	+12.2	+17.4	+ 24.0	+17.1	+15.7	− 8.6
May	+21.1	+26.8	+ 7.7	+11.0	+37.0	+15.3	+10.0	+ 5.7	+ 54.3	+ 7.1	+ 7.7	+ 2.1
June	+12.9	+34.8	+ 0.9	+24.5	+31.1	+ 9.9	+ 9.7	+ 1.3	+ 78.3	+17.9	+16.8	+ 9.1
July	+29.9	+69.0	+ 8.1	+22.6	+ 8.3	+32.8	+20.8	+ 1.7	+130.2	+13.9	+10.5	+10.6
August	+24.2	+64.5	+10.5	+21.5	+11.2	+22.8	+16.5	− 0.9	+139.9	+18.7	+ 7.6	+16.1
September	+ 5.5	+60.0	+ 9.2	+19.9	+34.1	+21.3	+17.6	+15.0	+ 78.8	+13.4	+ 9.4	− 1.4
October	+23.0	+41.1	+17.6	− 5.0	+83.4	+18.8	+13.8	+40.1	+ 7.0	− 2.5	+ 2.0	−15.0
November	− 8.4	+41.6	+13.2	− 4.2	+92.0	+ 6.2	+10.2	+13.4	+ 52.7	+ 0.5	+16.3*	+ 3.5*
December	− 5.6	+39.5	+13.5	+ 0.7	+81.4	+ 8.2	+13.9	+17.4	+ 64.3	− 1.3	+16.2*	+ 3.5*
Total	+14.0	+26.3	+10.3	+ 5.6	+43.1	+18.8	+12.8	+ 9.4	+ 53.2	+ 8.7	+10.3	+ 3.0

* November and December 1941 estimated for these networks from published information.

Sources: CBS Research Department Records for CBS; Publishers Information Bureau for MBS and NBC.

PUBLISHERS' INFORMATION BUREAU, INC., 31 East 10th Street, New York, New York

Publishers' Information Bureau (PIB) was founded in 1915 to provide advertising expenditure records for the leading national magazines and farm papers. In 1933, this service also began to publish monthly figures for advertisers' gross expenditures for network time. This organization checks all advertising insertions in 103 magazines, 42 farm papers, and all nationwide network broadcasting. It offers the only service of its kind and is the recognized source for expenditure figures in the fields of national magazines, farm papers and network radio. Forty of the leading advertising agencies subscribe to these reports and make the collection of these data feasible.

[fol. 462] EXHIBIT "B" TO REPLY AFFIDAVIT OF FRANK STANTON

Mutual Broadcasting System

Trend of Gross Sales of Network Time, as shown by

12 Months Sales Ending at Month Indicated

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	—	$1,386	$2,035	$2,293	$2,968	$3,332	$4,955
February	—	1,481	2,105	2,316	2,989	3,393	5,059
March	—	1,579	2,161	2,302	3,063	3,477	5,182
April	—	1,600	2,221	2,291	3,136	3,578	5,269
May	—	1,619	2,246	2,331	3,177	3,666	5,444
June	—	1,633	2,259	2,416	3,202	3,731	5,677
July	—	1,680	2,251	2,481	3,253	3,755	5,983
August	—	1,730	2,225	2,549	3,293	3,778	6,302
September	—	1,816	2,189	2,617	3,303	3,851	6,524
October	—	1,907	2,156	2,726	3,383	4,207	6,579
November	—	1,961	2,187	2,828	3,349	4,508	6,910
December	$1,293	1,979	2,239	2,920	3,330	4,767	7,301

Source: Publishers Information Bureau

EXHIBIT "C" TO REPLY AFFIDAVIT OF FRANK STANTON

Columbia Broadcasting System

Trend of Gross Sales of Network Time, as shown by

12 Months Sales Ending at Month Indicated

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	—	$17,770	$23,646	$29,223	$27,139	$35,442	$41,359
February	—	18,025	24,001	29,639	27,001	36,231	41,531
March	—	18,367	24,388	30,114	26,892	36,818	41,947
April	—	18,703	25,001	29,975	27,322	37,287	42,516
May	—	19,165	25,812	29,856	27,977	37,760	42,770
June	—	19,601	26,786	29,501	28,716	38,044	43,333
July	—	19,983	27,481	28,880	29,660	38,804	43,760
August	—	20,337	28,204	28,349	30,578	39,338	44,300
September	—	21,089	28,394	27,922	31,540	39,884	44,717
October	—	21,913	28,144	27,804	32,519	40,519	44,614
November	—	22,621	28,369	27,603	33,540	40,735	44,633
December	$17,638	23,168	28,722	27,345	34,540	41,026	44,564

Source: CBS Research Department.

[fol. 463]

Exhibit "D" to Reply Affidavit of Frank Stanton

National Broadcasting Co.—Red Network

Trend of Gross Sales of Network Time, as shown by

12 Months Sales Ending at Month Indicated

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	—	$19,402	$23,295	$27,432	$31,485	$34,801	$39,049
February	—	19,386	23,871	27,665	31,772	35,157	39,113
March	—	19,421	24,487	27,870	32,045	35,279	39,485
April	—	19,524	25,029	28,025	32,254	35,605	39,955
May	—	19,497	25,641	28,391	32,456	35,888	40,196
June	—	19,478	26,359	28,732	32,478	36,137	40,670
July	—	19,685	26,765	29,091	32,672	36,672	40,997
August	—	19,974	27,306	29,364	32,920	37,104	41,230
September	—	20,683	27,370	29,704	33,141	37,563	41,518
October	—	21,286	27,175	30,280	33,645	38,018	41,594
November	—	22,035	27,056	30,870	34,014	38,351	42,178*
December	$19,499	22,646	27,172	31,187	34,399	38,800	42,777*

Source: Publishers Information Bureau.

*November and December, 1941, monthly gross sales estimated.

Exhibit "E" to Reply Affidavit of Frank Stanton,

National Broadcasting Co.—Blue Network

Trend of Gross Sales of Network Time, as shown by

12 Months Sales Ending at Month Indicated

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	—	$11,534	$12,089	$11,471	$10,218	$10,814	$11,971
February	—	11,506	12,094	11,440	10,232	10,842	12,070
March	—	11,483	12,055	11,427	10,273	10,853	12,133
April	—	11,440	12,049	11,305	10,314	11,008	12,043
May	—	11,344	12,091	11,138	10,400	11,058	12,062
June	—	11,305	12,052	10,995	10,559	11,058	12,137
July	—	11,319	11,923	10,888	10,691	11,081	12,236
August	—	11,431	11,745	10,770	10,814	11,074	12,347
September	—	11,446	11,645	10,559	10,929	11,179	12,336
October	—	11,760	11,483	10,417	10,881	11,551	12,141
November	—	11,824	11,515	10,345	10,838	11,682	12,180*
December	$11,650	11,878	11,479	10,275	10,846	11,863	12,223*

Source: Publishers Information Bureau.

*November and December, 1941, monthly gross sales estimated.

[fol. 444] EXHIBIT "F" TO REPLY AFFIDAVIT OF FRANK STANTON

Mutual Broadcasting System

Trend to Gross Sales of Network Time for 12 Months

Ending with Each Month Indicated

Index: 3 Year Average 1936-1938 = 100%

Month	1935	1936	1937	1938	1939	1940	1941
January	—	58.2%	85.5%	96.4%	124.7%	140.0%	208.2%
February	—	62.2	88.5	97.3	125.6	142.6	212.6
March	—	66.4	90.8	96.7	128.7	146.1	217.8
April	—	67.2	93.4	96.3	131.8	150.4	221.4
May	—	68.0	94.4	97.9	133.5	154.0	228.8
June	—	68.6	94.9	101.5	134.6	157.0	238.6
July	—	70.6	94.6	104.3	136.7	157.8	251.4
August	—	72.7	93.5	107.1	138.4	158.8	264.8
September	—	76.3	92.0	110.0	138.8	161.8	274.1
October	—	80.1	90.6	114.6	142.2	176.8	276.5
November	—	82.4	91.9	118.8	140.7	189.4	290.3
December	54.3%	83.2	94.1	122.7	139.9	200.3	306.8

*Average 12 month total of gross sales for years 1936, 1937, 1938 = $2,379,573. The 12 months' total of gross sales ending with each month above, is then expressed as a per cent of this average.

EXHIBIT "G" TO REPLY AFFIDAVIT OF FRANK STANTON

Columbia Broadcasting System

Trend of Gross Sales of Network Time for 12 Months

Ending with Each Month Indicated

Index: 3 Year Average 1936-1938 = 00%

Month	1935	1936	1937	1938	1939	1940	1941
January	—	67.3%	89.5%	110.6%	102.8%	134.2%	156.6%
February	—	68.2	90.9	112.2	102.2	137.2	157.2
March	—	69.5	92.3	114.0	101.8	139.4	158.8
April	—	70.8	94.7	113.5	103.4	141.2	161.0
May	—	72.6	97.7	113.0	105.9	143.0	161.9
June	—	74.2	101.4	111.7	108.7	144.0	164.1
July	—	75.7	104.0	109.3	112.3	146.9	165.7
August	—	77.0	106.8	107.3	115.8	148.9	167.7
September	—	79.8	107.5	105.7	119.4	151.0	169.3
October	—	83.0	106.6	105.3	123.1	153.4	168.9
November	—	85.6	107.4	104.5	127.0	154.2	169.0
December	66.8%	87.7	108.7	103.5	130.8	155.3	168.8

Average 12 month total of gross sales for years 1936, 1937, 1938 = $26,411,887. The 12 months' total of gross sales ending with each month above, is then expressed as a per cent of this average.

[fol. 465] EXHIBIT "H" TO REPLY AFFIDAVIT OF FRANK STANTON

National Broadcasting Co.—Red Network

Trend of Gross Sales of Network Time for 12 Months Ending with Each Month Indicated

Index: 3 Year Average 1936–1938=100%*

Month	1935	1936	1937	1938	1939	1940	1941
January	—	71.9%	86.3%	101.6%	116.6%	128.9%	144.6%
February	—	71.8	88.4	102.5	117.5	130.2	144.9
March	—	71.9	90.7	103.2	118.7	130.7	146.2
April	—	72.3	92.7	103.8	119.5	131.9	148.0
May	—	72.2	95.0	105.1	120.2	132.9	148.9
June	—	72.1	97.6	160.4	120.3	133.8	150.6
July	—	72.9	99.1	107.7	121.0	135.8	151.8
August	—	74.0	101.1	108.7	121.9	137.4	152.7
September	—	76.6	101.4	110.0	122.7	139.1	153.8
October	—	78.8	100.6	112.1	124.6	140.8	154.0
November	—	81.6	100.2	114.3	126.0	142.0	156.2**
December	72.2%	83.9	100.6	115.5	127.4	143.7	158.4**

* Average 12 months total of gross sales for years 1936, 1937, 1938=$27,001,566. The 12 months' total of gross sales ending with each month above is then expressed as a percent of this average.

** November and December 1941, based on estimated monthly gross sales for that portion of the 12-month period.

EXHIBIT "I" TO REPLY AFFIDAVIT OF FRANK STANTON

National Broadcasting Co.—Blue Network

Trend of Gross Sales of Network Time for 12 Months Ending with Each Month Indicated

Index: 3 Year Average 1936–1938=100%*

Month	1935	1936	1937	1938	1939	1940	1941
January	—	102.9%	107.8%	102.3%	91.1%	96.5%	106.8%
February	—	102.6	107.9	102.0	91.3	96.7	107.7
March	—	102.4	107.5	101.9	91.6	96.8	108.2
April	—	102.0	107.5	100.8	92.0	98.2	107.4
May	—	101.2	107.8	99.3	92.8	98.6	107.6
June	—	100.8	107.5	98.1	94.2	98.7	108.3
July	—	101.0	106.4	97.1	95.4	98.8	109.1
August	—	102.0	104.8	96.1	96.5	98.8	110.1
September	—	102.1	103.9	94.2	97.5	99.7	110.0
October	—	104.9	102.4	92.9	97.1	103.0	108.3
November	—	105.5	102.7	92.3	96.7	104.2	108.6**
December	103.9%	105.9	102.4	91.7	96.7	105.8	109.0**

* Average 12 month total of gross sales for year 1936, 1937, 1938=$11,211,071. The 12 months' total of gross sales ending with each month above, is then expressed as a percent of this average.

** November and December 1941, based on estimated monthly gross sales for that portion of the 12-month period.

[fol. 446] EXHIBIT "J" TO REPLY AFFIDAVIT OF FRANK STANTON

Mutual Broadcasting System

Gross Sales of Network Time, Excluding Cost of Talent
1935–1941

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	$65	$158	$214	$268	$315	$318	[illegible]
February	67	162	232	256	277	338	[illegible]
March	94	191	247	233	307	391	[illegible]
April	118	140	200	190	263	363	[illegible]
May	111	130	155	194	235	322	[illegible]
June	91	105	117	202	228	299	[illegible]
July	63	110	102	167	217	235	[illegible]
August	72	122	97	165	205	228	[illegible]
September	83	169	133	200	211	283	[illegible]
October	180	272	239	348	428	785	[illegible]
November	173	228	258	361	327	628	[illegible]
December	175	193	245	337	318	577	[illegible]
Total	$1,293	$1,979	$2,239	$2,920	$3,330	$4,767	$7,[illegible]

Source: Publishers Information Bureau.

EXHIBIT "K" TO REPLY AFFIDAVIT OF FRANK STANTON

Columbia Broadcasting System

Gross Sales of Network Time, Excluding Cost of Talent
1935–1941

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	$1,769	$1,901	$2,379	$2,880	$2,674	$3,576	$3,[illegible]
February	1,654	1,909	2,264	2,680	2,542	3,331	3,[illegible]
March	1,830	2,172	2,560	3,034	2,926	3,513	3,[illegible]
April	1,615	1,951	2,563	2,424	2,854	3,323	3,[illegible]
May	1,287	1,750	2,561	2,442	3,097	3,571	3,[illegible]
June	1,067	1,503	2,477	2,121	2,860	3,144	3,[illegible]
July	910	1,294	1,988	1,368	2,312	3,071	3,[illegible]
August	879	1,233	1,955	1,424	2,342	2,876	3,[illegible]
September	1,087	1,839	2,029	1,602	2,563	3,110	3,[illegible]
October	1,931	2,755	2,505	2,387	3,367	4,001	3,[illegible]
November	1,722	2,430	2,654	2,453	3,474	3,690	3,[illegible]
December	1,886	2,433	2,787	2,529	3,529	3,820	3,[illegible]
Total	$17,638	$23,168	$28,722	$27,345	$34,540	$41,026	$44,[illegible]

Source: CBS Research Department Records.

[fol. 447] EXHIBIT "L" TO REPLY AFFIDAVIT OF FRANK STANTON

National Broadcasting Co.—Red Network

Gross Sales of Network Time, Excluding Cost of Talent
1935–1941

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	$1,822	$1,725	$2,375	$2,635	$2,932	$3,335	$3,584
February	1,714	1,698	2,274	2,507	2,744	3,100	3,164
March	1,879	1,915	2,531	2,736	3,060	3,182	3,554
April	1,660	1,762	2,304	2,458	2,668	2,993	3,463
May	1,677	1,650	2,261	2,628	2,829	3,112	3,353
June	1,509	1,490	2,209	2,550	2,572	2,821	3,295
July	1,406	1,613	2,019	2,377	2,571	3,106	3,433
August	1,265	1,554	2,094	2,368	2,617	3,049	3,282
September	1,285	1,993	2,058	2,397	2,618	3,077	3,366
October	1,815	2,418	2,223	2,799	3,292	3,747	3,822
November	1,659	2,408	2,289	2,878	3,257	3,590	4,174*
December	1,808	2,419	2,535	2,853	3,238	3,687	4,286*
Total	$19,499	$22,646	$27,172	$31,187	$34,399	$38,800	$42,777

Source: Publishers Information Bureau.

* November and December estimated.

EXHIBIT "M" TO REPLY AFFIDAVIT OF FRANK STANTON

National Broadcasting Co.—Blue Network

Gross Sales of Network Time, Excluding Cost of Talent
1935–1941

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	$1,073	$957	$1,167	$1,159	$1,102	$1,070	$1,179
February	1,045	1,017	1,022	991	1,004	1,032	1,130
March	1,146	1,123	1,083	1,070	1,111	1,122	1,185
April	1,022	980	974	852	893	1,048	958
May	1,008	912	953	786	873	922	941
June	872	833	794	651	810	821	896
July	803	817	689	581	713	725	824
August	757	869	691	573	696	689	800
September	879	893	793	582	698	802	791
October	964	1,279	1,117	975	927	1,299	1,104
November	996	1,060	1,092	1,021	978	1,109	1,148*
December	1,086	1,140	1,104	1,034	1,042	1,223	1,266*
Total	$11,650	$11,878	$11,479	$10,275	$10,846	$11,863	$12,223

Source: Publishers Information Bureau.

* November and December estimated.

[fol. 447a] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FRANK STANTON

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

FRANK STANTON, being duly sworn, deposes and says:

I am Director of Research of Columbia Broadcasting System, Inc. And I have been its Director of Research since November, 1938. I am fully familiar with available records relating to business aspects of the broadcasting industry, with the relative desirability of stations and networks as advertising media, and with the practice of the industry relating to the purchase and sale of broadcasting time of radio stations for advertising purposes.

Attached hereto and made part hereof is a copy of the December 1941 issue of "Radio Advertising Rates and Data" published by Standard Rate & Data Service. This publication, which is issued monthly, constitutes the most complete, up-to-date and accurate record available to the industry covering lists of radio stations and the power, frequency, commercial advertising rates and commercial policy of radio stations, and is universally used by advertisers, advertising agencies and others in map-ing radio [fol. 447b] advertising campaigns and in choosing stations and evaluating their relative desirability for advertising purposes.

Frank Stanton.

Subscribed and sworn to before me this 12th day of December, 1941. Margaret E. Landry, Notary Public, Westchester County. Certificate filed in N. Y. Co. Clk's No. 940. Reg. 2L573. Term expires March 30, 1942.

[fol. 448]

IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

APPEARANCE OF FEDERAL COMMUNICATIONS COMMISSION

In accordance with the provisions of the Act of October 22, 1913 (38 Stat. 219) as extended by Section 402(a) of the Communications Act of 1934, as amended, the Federal Communications Commission hereby enters its appearance as a party defendant, and the appearance of its counsel in the above-entitled matter.

By filing this Appearance the Commission does not concede the jurisdiction of the Court of this case.

Federal Communications Commission, by Telford Taylor, General Counsel. Thomas E. Harris, Assistant General Counsel.

AFFIDAVIT OF SERVICE.

CITY OF WASHINGTON,
District of Columbia, ss:

TELFORD TAYLOR, being first duly sworn on oath, deposes and says that on this 1st day of November, 1941, he served copies of the foregoing Appearance of Federal Communications Commission by placing same in envelopes, postpaid and duly addressed to each of the following: John J. Burns, attorney for plaintiff, 40 Wall Street, New York, New York, The Honorable Francis Biddle, Attorney General of the United States of America, Department of Justice, Washington, D. C.; and The Honorable Mathias F. Correa, United States Attorney for the Southern District of New York, United States Courthouse, Foley Square, New York, New York, and by depositing same in the United States mail chute at the Benjamin Franklin Post Office, Washington, D. C.

Telford Taylor.

Subscribed to and sworn before me this 1st day of November, 1941. Stephen Tuby Jr., Notary Public. My Commission expires Oct. 14, 1943.

[fol. 449] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Upon the complaint herein and upon the annexed affidavit of Telford Taylor, verified the 5th day of November, 1941, and exhibit referred to therein and filed therewith, and upon all the other papers and proceedings heretofore filed and had herein, the defendants in the above-entitled cause move this Court to dismiss the complaint or, in the alternative, for summary judgment in their favor.

The grounds of the motions are:

1. The Court lacks jurisdiction of the subject matter of this action under the special statutory provisions referred to in the preamble to the complaint.

2. The complaint fails to state a claim upon which relief can be granted.

3. Even if the Court have jurisdiction of the subject matter of this action, the pleadings and other papers on file and the affidavit submitted on these motions and exhibit referred to therein and filed therewith show that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law.

Dated: Washington, D. C., November 7th, 1941.

(S.) Samuel Brodsky, Attorney for the United States of America, United States Court House, Foley Square, New York, N. Y. Telford Taylor, Thomas E. Harris, Attorneys for Federal Communications Commission, 7528 New Post Office Building, Washington, D. C.

[fol. 450] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF TELFORD TAYLOR

DISTRICT OF COLUMBIA, ss:

TELFORD TAYLOR, being duly sworn, says:

1. He is General Counsel of the Federal Communications Commission and as such is familiar with the Commission's

proceedings taken under Order No. 37, Docket No. 5060, and that the proceedings include the following:

(a) The Federal Communications Commission on March 18, 1938, by Order No. 37, authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity." On April 6, 1938, a committee of three Commissioners was appointed by the Commission to supervise the investigation, to hold hearings in connection therewith, and "to make reports to the Commission with recommendations for action by the Commission."

(b) Between November 14, 1938, and May 19, 1939, the committee held hearings pursuant to public notice that the Commission would hear any person or organization desiring to present evidence on the matters included for investigation in Commission Order No. 37. The committee requested the national networks, regional networks, station licensees, and transcription and recording companies to present evidence. It also requested information by questionaire from licensees of stations and from holders of stock in licensee corporations. In addition, persons and organizations requesting an opportunity to present evidence material to the investigation were given an opportunity to be heard. In all, the committee actually heard witnesses on 73 days during this 6-month period. Ninety-six witnesses were heard. Their evidence fills 8,713 pages of transcript. Seven hundred and seven exhibits were introduced. The testimony and exhibits fill 27 large volumes.

[fol. 451] (c) Twenty of the ninety-six witnesses were called by the National Broadcasting Co.; they testified for the equivalent of more than 24 hearing days. Their testimony fills 3,225 of the 8,713 pages of transcript. They introduced 227 of the 707 exhibits. The testimony of one National Broadcasting Company witness, David Sarnoff, president of the Radio Corporation of America and chairman of the Board of the National Broadcasting Company, fills 200 pages.

(d) Seventeen witnesses appeared on behalf of Columbia Broadcasting System. They testified for the equivalent of more than 16 hearing days. Their testimony fills 2,180 pages of the transcript and they introduced 186 exhibits.

The testimony of the president of the Columbia Broadcasting System fills 130 pages of the transcript.

(e) Eight witnesses for the Mutual Broadcasting System testified for the equivalent of more than 6 hearing days, filling 670 pages of the transcript and introducing 53 exhibits.

(f) On June 12, 1940, the committee issued its report based upon the evidence adduced at the hearings and the official records of the Commission.

(g) In November, 1940 briefs in the proceeding were filed on behalf of National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System and other interested parties. On December 2 and 3, 1940, oral arguments before the full Commission were presented by the parties. These arguments were directed to the committee report and to certain draft regulations issued for the purpose of giving scope and direction to the oral arguments. On January 2, 1941, supplementary briefs were filed on behalf of National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System in which were discussed the jurisdiction of the Commission with respect to matters covered by the committee report and the draft regulations, and in which attention was given to the actual and feasible limits of competition in the broadcasting field, with particular reference to network broadcasting.

(h) On May 2, 1941, the Commission issued its report setting forth its findings and conclusions in the proceeding, together with an order adopting eight regulations (Regu- [fol. 452] lations 3.101 to 3.108 inclusive) setting forth policies which the Commission would thereafter apply in exercising its licensing functions. Two of the seven Commissioners filed additional views dissenting from the action taken by the Commission. The effective date of the regulations was deferred for 90 days from the date of the order with respect to existing contracts, arrangements, or understandings, or network organization station licenses, and further provision was made for extension of the effective date of Regulation 3.106 in order to permit the orderly disposition of properties. On June 13, 1941, the Commission provided for the postponement for 90 days from May 2, 1941 of Regulation 3.107, and for further postponement of the effective date of that regulation in order to permit the orderly disposition of properties. On July 22, 1941, the

effective date of the regulations with respect to existing contracts, arrangements, or understandings, or network organization station licenses, or the maintenance of more than one network by a single network organization was again deferred until September 16, 1941, and on August 28, 1941, said effective date was postponed until after the disposition of the petition of the Mutual Broadcasting System to amend Regulations 3.103 and 3.104.

(i) On August 14, 1941, the Mutual Broadcasting System petitioned the Commission to amend two of the regulations, 3.103 and 3.104. Upon this petition the Commission called for briefs and oral argument by interested parties. Briefs were filed by National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System and by one regional network organization and oral argument was held before the Commission on September 12, 1941. Thereafter, on October 11, 1941, the Commission issued a Supplemental Report on Chain Broadcasting (two of the six Comissioners dissenting) together with amendments to three of the regulations (3.102, 3.103, and 3.104). The Commission simultaneously postponed the effective date of the regulations with respect to existing contracts, arrangements, or understandings, or network organization station licenses until November 15, 1941, and suspend the effective date of Regulation 3.107 indefinitely, with the provision that any subsequent order of the Commission placing Regulation 3.107 in effect should provide for not less than six months' notice and for further extension of its [fol. 453] effective date from time to time in order to permit the orderly disposition of properties.

(j) On October 31, 1941, the Commission issued its minute setting forth the procedure to be followed in applying the Chain Broadcasting Regulations. Said minute reads as follows:

"If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing.

In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the license thereupon conforms to the decision.

"The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106 relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

"The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations."

2. A certified copy of said proceedings before the Commission in connection with Order No. 37, Docket No. 5060, is filed herewith and incorporated herein by reference as Exhibit A.

[fol. 454] 3. Among the grounds urged by plaintiff in support of its contention that the action of the Commission promulgating the Chain Broadcasting Regulations is invalid are that:

"1. The Rules are unreasonable, arbitrary and destructive of plaintiff's business without legitimate reason.

"2. The Rules are not required by and do not serve the public interest, convenience and necessity.

"3. The Rules are not necessary to carry out the provisions or the purposes of the Communications Act of 1934.

"4. The Rules are in fact contrary to the public interest, convenience and necessity, and to the provisions and purposes of the Communications Act of 1934."

Affiant submits that Exhibit A is relevant on the above issues sought to be raised and that it shows that the regulations are not arbitrary and capricious but that they serve public interest, convenience or necessity and carry out the

provisions or purposes of the Communications Act, and that there is no genuine issue as to any material fact.

Telford Taylor.

Subscribed and Sworn before me this 5th day of November, 1941. Pansy E. Wiltshire, Notary Public. Comm. Exp. 10/31/45.

IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AND ORDER GRANTING TEMPORARY SUSPENSION OF COMMISSION'S ORDER

It is hereby stipulated by and between all the parties by their respective counsel:

1. That counsel for all parties will cooperate to bring on for hearing on or before December 15, 1941, the Motion for Preliminary Injunction heretofore filed by plaintiffs and the defendants' Motion to Dismiss the Complaint or, in the alternative, for Summary Judgment.

[fol. 455] 2. Pending such hearing by this Court and the determination by it of plaintiffs' said Motion for Preliminary Injunction, the defendant Federal Communications Commission is suspending, and will take no steps for enforcement or application of, the Commission's Order of May 2, 1941, in Docket No. 5060, at last amended October 11, 1941, with respect to any failure by any radio station to comply with such Order.

3. Any party hereto may move before the Court to modify the terms of this stipulation to the same extent which such party would be entitled to had this stipulation been in the form of a temporary restraining order issued after hearing.

United States of America, By Samuel Brodsky, Special Assistant to the Attorney General. Federal Communications Commission, By Telford Taylor, General Counsel. Thomas E. Harris, Assistant General Counsel. Columbia Broadcasting System, Inc., By John J. Burns.

So ordered. 12 November, 1941.

Learned Hand, United States Circuit Judge. Henry W. Goddard, United States District Judge. John Bright, United States District Judge.

IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE

The Mutual Broadcasting System, Inc., having moved for an order granting it leave to intervene as a party defendant in the above entitled proceeding,

Now, upon reading and filing the notice of motion of Mutual Broadcasting System, Inc., dated December 10, 1941, and the Motion to intervene and the proposed answer of Mutual Broadcasting System, Inc., annexed thereto, and upon all the papers and proceedings herein, and upon the consent of the attorneys for all the parties hereto affixed to the foot of a copy of this order, and upon motion of Leon Lauterstein, attorneys for Mutual Broadcasting System, Inc., it is

[fols. 456-469] Ordered, that said motion be and the same hereby is granted, and it is further

Ordered, that Mutual Broadcasting System, Inc., be and the same hereby is made a party defendant in the above entitled proceeding.

Learned Hand, U. S. Circuit Judge. John Bright, U. S. District Judge. Henry W. Goddard, U. S. District Judge.

Dated, New York, December 29th, 1941.

Consented to:

John J. Burns, Attorney for Columbia Broadcasting System, Inc. Samuel Brodsky, Special Assistant to the Attorney General for the United States of America. Telford Taylor, Thomas E. Harris, Attorneys for Federal Communications Commission. Leon Lauterstein, Emanuel Dannett, Attorneys for Mutual Broadcasting System, Inc.

• • • • • • •

[fol. 470] (Endorsed on cover: "I am in favor of denying the petition. 6/30/42. John Bright. Henry W. Goddard.)

In District Court of the United States for the Southern District of New York

Civil Action No. 16-178

Civil Action No. 16-179

[Title omitted]

Petition to Expedite Reargument on Defendants' Motions for Summary Judgment

Now come the defendants United States of America and the Federal Communications Commission, and pray [1] the Court to reconsider its action of June 18, 1942, postponing [fol. 471] further proceedings in these cases until October 8, 1942, and to schedule further argument on the defendants' motions for summary judgment on July 7, 1942, or on such other date during the first two weeks of July as may be convenient.

The principal ground of this petition is that the Court's action of June 18, 1942 is not consistent with the statutory requirement that cases under the Urgent Deficiencies Act "shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day".

---

[1] This prayer is made by petition rather than motion since it can appropriately be considered and acted on without oral argument or convocation of the Court. The plaintiffs in these cases made no formal motion for reargument on the defendants' motion for summary judgment, nor is the Court's action of June 18, 1942 setting the reargument for October 8 and 9, 1942 embodied in an order. As was stated to the Court on June 18, counsel for the plaintiffs agreed (subject, of course, to the Court's direction) that reargument of the motions for summary judgment should be held on June 30, 1942 or some other proximate date which would meet the Court's convenience.

In support of this petition the defendants respectfully show the Court:

(1) These suits were filed on October 31, 1941 and on February 21, 1942 this Court dismissed the complaints for lack of jurisdiction.

(2) When the plaintiffs indicated their intention to appeal to the Supreme Court, all parties cooperated in expediting the appeals so that they could be heard prior to the end of the October, 1941 Term. Seven days after entry of the orders allowing the appeals, the records were filed in the Supreme Court. On March 16, 1942, the Supreme Court entered an order noting its jurisdiction. The appellants' briefs were filed April 13, 1942 and the Government's brief was filed on April 27, 1942. Oral argument began on April 30, 1942 and was concluded on May 1, 1942.

(3) On June 1, 1942, the Supreme Court reversed the order of this Court. Under Rule 34 of the Supreme Court, the mandate would not have been returned to this Court until after the expiration of twenty-five days from the Court's decision. In order that the proceedings could go forward expeditiously, the parties stipulated that the mandate could issue forthwith.

[fol. 472] (4) On June 8, 1942, the day the Supreme Court returned the mandate, counsel for the Government telephoned counsel for the plaintiff in No. 16-179 and offered to rest its motion for summary judgment on the argument held in January, without further argument. Two days later counsel for the plaintiff in No. 16-179 informed counsel for the Government that the plaintiffs in both cases wanted further argument and might wish to file additional briefs, but agreed that the reargument should be held at this term of Court. It was stated that counsel for the plaintiffs did not desire a full reargument but would limit themselves to contending further that the case should not be disposed of on the motion for summary judgment, but only after a *trial de novo* and the taking of evidence before the full Court. On June 16 counsel for the plaintiff in No. 16-179 informed counsel for the Government that the plaintiffs in both cases had selected June 30th as the date for reargument, and would request the Court to convene on that date.

(5) On June 18, 1942, this Court met and considered the parties' request for hearing on June 30. It determined that further proceedings should be postponed until October 8, 1942.

(6) The Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, 220, 28 U. S. C. sec. 47, which is expressly made applicable to suits to enjoin the enforcement of orders of the Federal Communications Commission (Communications Act of 1934, 48 Stat. 926, 47 U. S. C. sec. 402 (a)), provides in part as follows:

"The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day * * *; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition * * * shall apply."

[fol. 473] The Supreme Court has said that one extraordinary feature of cases arising under the Urgent Deficiencies Act is that:

"Upon both the trial court and the Supreme Court rests the obligation to give the case precedence over others.

* * * * * * *

"In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the decisions thereof. In such cases Congress sought to guard against ill-considered action by a single judge and to avert the delays ordinarily incident to litigation." (*United States v. Griffin*, 303 U. S. 226, 232-233.)

See also, *Stratton v. St. Louis S. W. Ry.*, 282 U. S. 10, 14; *Moore v. Fidelity & Deposit Co.*, 272 U. S. 317, 320-321; and *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 545.

(7) It is believed that to postpone further proceedings in this case until October 8, 1942, would be to nullify the expediting provisions of the Urgent Deficiencies Act. We,

of course, appreciate the fact that the dockets of the members of this Court are crowded and that some cases must, therefore, give way to others. However, it is submitted that it is the plain mandate of Congress that cases under the Urgent Deficiencies Act should be given precedence and heard forthwith.

(8) Holding this reargument at an early date will greatly expedite the final disposition of these cases. If the Court agrees with the Government's contention that no *trial de novo* is necessary, the cases will be available for final disposition without further hearing. If the Court determines that a trial should be held, the parties will be so informed and can immediately commence to prepare for trial, before the Court or before a Special Master (*Borden's Farm Products Co.* v. *Ten Eyck*, 11 F. Supp. 599, aff'd. 297 U. S. [fol. 474] 251). As the situation now stands, there will be a delay of over three months before the parties even learn whether or not there is to be a trial.

(9) The fact that the administrative proceedings before the Commission covered three years in no way affects the need for expedition of this litigation:

(a) It cannot seriously be argued that the Commission should have formulated its policies without careful study and due deliberation. In the nature of things, the careful formulation of important policies by an administrative body, in a field where a full understanding of the facts is essential, is time-consuming.

(b) At the hearing on June 18, 1942, counsel for the plaintiff in No. 16-179 stressed the lapse of time between the conclusion of the hearings before the Commission and the final promulgation of the rules here attacked.[2] Counsel for the plaintiffs were not, as was the Commission, confronted with the responsibility of comprehending and analyzing 8,713 pages of testimony and 707 exhibits, preparing a comprehensive and accurate report, and carefully weigh-

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[2] For the convenience of the Court, a copy of the Stenographer's Minutes of the proceedings on June 18, 1942, is attached to this petition as Exhibit A. The remarks of counsel for the plaintiff referred to above appear at the top of page 412.

ing the significance of the facts in order to develop a policy which would serve the public interest. It hardly lies in the mouth of counsel for the plaintiffs to attack the Commission's performance of these difficult functions as too deliberate, particularly since, as the Commission's records disclose, the date for filing briefs before the full Commission was twice postponed at the request of the plaintiffs in these cases.

[fol. 475] (c) In any event, since the decision of the Supreme Court it is clear that these are cases under the Urgent Deficiencies Act, and Congress has declared and the Supreme Court has emphasized that such cases must be handled expeditiously. The situation in these cases is in no way unique; rate cases and other regulatory administrative proceedings frequently consume several years, and indeed the more important the case the more likely it is that the administrative proceedings will be lengthy. It is extraordinary to suggest that the mandate of the statute may be disregarded under such circumstances.

(10) Counsel for the plaintiffs have stated to counsel for the Government that the question on which they desire reargument is whether the cases can be decided on motions for summary judgment and the administrative record before the Commission, or whether a *trial de novo* should be held.[3] Counsel for the Government believe that, assuming a reasonable degree of restraint by counsel for all parties, this limited degree of reargument need not be very time-consuming.

(11) The opinion of the Supreme Court clearly contemplates that this Court shall determine after receipt of the mandate whether and on what terms the regulations should be stayed. The opinion concludes:

"The stay now in effect will be continued on terms to be settled by the court below."

The Government regards this as continuing the stay until this Court takes further action, presumably by acting on [fol. 476] plaintiffs' motions for preliminary injunction,

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[3] See the Stenographer's Minutes of the proceedings on June 18, pages 406, 407.

which are now available for disposition. But it is respectfully urged that such disposition should be prompt, and that further argument on the motions, if any, should be had together with the reargument on the motions for summary judgment.

Under the Urgent Deficiencies Act, temporary stay orders issued by this Court are limited to sixty days. Accordingly, when this Court on March 2, 1942, allowed a temporary stay pending appeal, it limited it "until May 1st, 1942, or the argument of the appeal herein in the Supreme Court of the United States, whichever is earlier." By stipulaton of the parties the stay was continued until the last decision day of the October, 1941, Term of the Supreme Court of the United States or until the determination of the pending appeals, whichever is earlier. Thus, the stay which the Supreme Court continued is the stay originally granted by this Court on March 2, 1942, as extended by stipulation of the parties until the decision. In view of the statutory provision limiting to sixty days this Court's power to grant temporary stays, it seems highly improbable that the Supreme Court contemplated that the stay, which it continued "on terms to be settled by the court below", would, in the absence of further action by this Court, extend until October 8, 1942, a total of 130 days from the date of the Supreme Court's decision.

(12) As matters now stand, plaintiffs' request for reargument is delaying further proceedings in these cases for several months. In the meantime, the parties do not even know whether or not a *trial de novo* will be had. Wherefore, it is respectfully prayed that reargument be held at the "earliest practicable day", giving precedence to this case [fol. 477] as is required by the Urgent Deficiencies Act.

Respectfully submitted, United States of America, by Samuel Brodsky. Federal Communcations Commission, by Telford Taylor, General Counsel; Charles R. Denny, Assistant General Counsel; Harrly M. Plotkin, Counsel.

Acknowledgment of Service

Service of the foregoing "Petition to Expedite Reargument on Defendants' Motions for Summary Judgment" ac-

knowledged and a true copy received thereof this 26th day of June, 1942.

—— ——, Solicitor for National Broadcasting Company, Inc.; —— ——, Solicitor for Woodmen of the World Life Insurance Society; —— ——, Solicitor for Stromberg-Carlson Telephone Manufacturing Company; —— ——, Solicitor for Columbia Broadcasting System, Inc.; Percy H. Russell, Jr., Solicitor for Mutual Broadcasting System, Inc.

[fol. 478] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendants,

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., Intervenors

ORDER ON MANDATE OF SUPREME COURT

The above named plaintiff, Columbia Broadcasting System, Inc., having appealed to the Supreme Court of the United States from the order of the specially constituted United States District Court entered herein February 21, 1942, dismissing the complaint on the ground that the Court had no jurisdiction over the subject-matter of the action, and said appeal having duly come on to be heard before the Supreme Court on the transcript of record and having been argued by counsel and the said Court having issued its mandate herein, dated June 8, 1942, wherein it was ordered, adjudged and decreed that the said order of the said District Court be and the same hereby was reversed, and that the cause be and the same thereby was remanded to the said District Court for further proceedings in conformity with the opinion of the Supreme Court, and the said mandate having been filed in the office of the Clerk of the said District Court on June 9, 1942,

[fol. 479] Now, upon said appeal and all the papers and proceedings had herein and upon said mandate, it is

Ordered, Adjudged And Decreed that the mandate of the Supreme Court of the United States, dated June 8, 1942, and filed herein on June 9, 1942 be and the same hereby is made the order and decree of this Court; and it is further

Ordered Adjudged And Decreed that the order entered herein on February 21, 1942 be and the same hereby is reversed and that this Court proceed in conformity with the opinion and decree of the Supreme Court of the United States.

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

[fol. 480] In United States District Court, Southern District of New York

Civil 16-178

National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, Plaintiffs,

vs.

The United States of America, The Federal Communications Commission and Mutual Broadcasting System, Inc., Defendants

Civil 16-179

Columbia Broadcasting System, Inc., Plaintiff,

vs.

The United States of America, Defendant

Federal Communications Commission and Mutual Broadcasting System, Inc., Intervenors

Before L. Hand, C. J., and Goddard and Bright, D. J. J.

On motions by the defendants for summary judgments dismissing the complaints herein in two actions to "annul" certain regulations of the Federal Communications Commission and to enjoin the Commission from enforcing them.

Charles R. Denny for the Commission.

Charles E. Hughes, Jr., for the Columbia Broadcasting System, Inc.

John T. Cahill for the National Broadcasting Company, Inc.

OPINION—November 16, 1942

[fol. 481] L. HAND, C. J.: These cases come before us a second time upon motions made by the defendants and the Mutual Broadcasting System—which has intervened—summarily to dismiss the complaints. The motions are made upon the complaints, upon certain affidavits of the counsel for the Commission, upon the Commission's report and all the proceedings and evidence before it, and—we shall assume—upon the affidavits filed by the plaintiffs on their motions for preliminary injunctions. We shall not repeat the outlines of the controversy as set forth in our opinion in 44 Fed. Suppl. 688, and in that of the Supreme Court which reversed our judgments dismissing the complaints, 316 U. S. 407; but shall proceed directly to consider the points raised.

The most important of these is whether the Commission had power to pass the challenged regulations. Everyone agrees that in granting licenses under §309 of Title 47, U. S. Code, it must distribute the available wave-lengths so as to give greatest possible service, and that it must see to it that all applicants have the necessary technical ability to broadcast programs, that the stations are properly constructed and properly manned and do not interfere with other stations, and that the licensees are responsible, morally and financially. All these things and perhaps more, the Commission may regulate in discharge of its duty to promote the "public convenience, interest, or necessity." The regulations at bar have, however, nothing to do with these qualifications of a licensee; they are addressed, not to his ability to broadcast any programs which he may accept, but to his freedom to procure other programs than those to which by contract with, or by the control of, the "networks" he is limited; they touch, not how he shall broadcast, but how unrestricted he shall be in doing so. The plaintiffs say that, judged both by its history and by its language, the Act gave the Commission power to consider only the qualifications first specified, leaving outside any administrative control all arrangements by which a station secures its programs. They say that, although it is true that §313 makes

"all laws * * * relating to unlawful restraints * * * applicable to * * * interest state or foreign radio communications," and that the courts have jurisdiction in this way to annul monopolies or restrictive contracts which affect broadcasting, only courts may do so; the Commssion must disregard any such considerations when deciding whether to grant or refuse a license.

Section 303 defines the Commission's powers; its original was §4 of the Radio Act of 1927 which had eleven subdivisions, of which the first ten were the same as the first eleven of §303 except for a new subdivision ("g") introduced into §303. The eighth subdivision ("h") of §4 of the Radio Act (now the ninth ("i") of §303) gave the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting;" and on it the Commission particularly relied. The plaintiffs answer that it was meant merely to give the Commission control over the power and wave-lengths used by stations while connected with "networks" for "chain broadcasting." It was introduced by an amendment in the Senate and originally read that the Commission should have power, "when stations are connected by wire for chain broadcasting," to "determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting." [fol. 482] The first clause of this amendment was indeed limited as the plaintiffs say; but the same was not true of the second clause. "Equitable radio service to the listeners" was a comprehensive phrase, read most naturally, it should include the best possible service compatible with such burdens as it was reasonable to impose upon the "networks" and their "affiliates"—"equitable," that is, in the sense that the interests of both sides were to be weighed. The fact that the occasion for the amendment appears to have been the Senate's apprehension that the "networks" might drown out "unaffiliated" stations, by no means circumscribed the scope of these words. This amendment finally emerged from Conference and was enacted, in the broad terms we have quoted; it would be altogether unwarranted to assume that it was intended to adopt the limited clause and to abandon the general one. We may start therefore with the strong probability that even in the

Radio Act of 1927 the Commission had power by virtue of this subdivision to regulate "chain broadcasting" generally in the interest of "listeners."

The amendment to § 303 of the Communications Act of 1934, that is, the interpolation of subdivision "g," confirms this interpretation. That subdivision reads as follows: "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." We can see no reason for confining the last clause to scientific or engineering problems; the purpose is apparent to give the Commission power to foster the industry in all appropriate ways. It is not clear that this was a new purpose; but if it was, it infused the powers already granted in the earlier act, broadening them in accord with the changed outlook—the power granted under subdivision "i" among the rest. The duty—for the power imposed a corresponding duty—to "encourage" the "larger" use of radio incidentally presupposed a power to prevent the frustration of the purpose so disclosed; we are not to construe the section as at war with itself. Therefore, even if § 303 stood alone, we should hold that subdivision "i" granted power to the Commission to consider the effect upon a station's choice of programs of any controls or restrictions exercised by the "networks."

However, § 303 does not stand alone. In addition to providing that all laws "relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade" should apply to "radio communications," § 313 also took over from § 15 of the Act of 1927 the provision that in actions brought under those laws or in proceedings to enforce orders of the Federal Trade Commission, whenever "any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may * * * decree that the license of such licensee shall * * * be revoked." As will be observed, revocation was here made a penalty like other penalties for monopoly or restraint of trade; the courts were not to use it as a means of compelling a licensee to furnish service free from unlawful restrictions, but to punish him for his past misconduct, the discretion accorded them being exercised according to the degree of his "guilt." This was

in harmony with the general scheme, for a court is not in good position to know how far a monopolistic or unfair competitive practice may interfere with "the larger and more [fol. 483] effective use of radio in the public interest;" if any official was competent to do so, it was the Commission. Section 13 of the Radio Act of 1927 had provided that if a court revoked a license, the Commission must refuse to renew it, but it had stopped there; and, as the law then stood, it might perhaps have been argued with some show of plausibility that an applicant's monopolistic or unfair competitive practices in the past were not relevant to the grant of a license.

However that may have been, § 13 was amended in 1934 by adding a new clause, and the resultant § 311, in addition to retaining the old language forbidding the restoration of a forfeited license, contained a new one providing that the Commission is "authorized to refuse such station license" whenever the applicant had been "finally adjudged guilty" by a "Federal court of * * * attempting unlawfully to monopolize radio communication * * * or to have been using unfair methods of competition." That power was certainly not to be used as a punishment: the Commission was not to overrule the court which had decided not to impose the penalty. Such a power would have been open to serious constitutional objection. What use then was the Commission to make of an adjudication of the applicant's "guilt"? Only, we submit, by considering it as evidence that, if granted a license, he would not use it for the "public convenience, interest, or necessity," i. e. that the grant of a license would not "encourage the larger and more effective use of radio in the public interest." The necessary implication from this was that the Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee. Thus, whatever may have been the limits of the Commission's earlier powers, manifestly after 1934 they included a consideration of how far licensees might be improperly restricted in the exploitation of their licenses.

The plaintiffs do not concede even this, as we understand it, but in any event they insist that the exercise of any such power was conditioned upon an earlier adjudication by some court. We can see no reason to suppose (al-

though apparently the Commission does not agree) that an applicant's violation of the statutes against monopoly and unfair competition, as such and alone, ever disentitles him to a license. It is indeed evidence relevant to his fitness for the reasons we have just given; but it is such only as any past conduct may be an earnest of what is to be expected in the future, and because a repetition would be prejudicial to the public interest. We construe this clause of § 311 as going no further than to provide the Commission with an estoppel as to any facts which a court may have found; these may be taken as data for any rational inference that can be drawn from them relevant to the ultimate issue; but "guilt" as "guilt" is not the ultimate issue. Certainly that is the only effect which it is necessary to give the clause; there is not the slightest warrant for inferring that in the absence of an adjudication, the Commission may not determine what has been an applicant's past conduct, or may not consider how far, if repeated, it would interfere with the fullest use of his license. Whatever may be the mysteries enveloping an adjudication of "guilt" under the Anti-Trust laws which make that issue unfit to be [fol. 484] entrusted as such to profane hands, the Commission is certainly peculiarly competent to appraise the effect upon broadcasting of restrictive or monopolistic practices, and is as competent to decide whether an applicant is likely to engage in them as it is to decide any of the other issues which come before it. The decision in *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470, is irrelevant; the only question decided was whether the injury suffered by an existing station was a material factor in licensing a new station.

The plaintiffs next challenge the regulations because they lay down general conditions for the grant of licenses instead of reserving decision until the issues arise upon an application. Such a doctrine would go far to destroy the power to make any regulations at all; nor can we see the advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future. It may perhaps be true that a party, who had no notice of the hearings before the Commission and no opportunity to present his side, would be entitled, when applying for a license, to a reconsideration of those findings upon which the regulations rested. None of the plaintiffs at bar are in that position; they were amply

advised of what the Commission proposed; they were invited to attend; all but the co-plaintiff "affiliates" of the National Broadcasting Company did so, put in whatever evidence they wished and were heard before the original regulations were passed, and again at the rehearing. They at any rate were accorded all the privileges they would have had if they had intervened in an application for a license. It would be futile after the expenditure of so much time and labor to hold that the proceedings were only advisory and concluded nobody; indeed, the mere fact that the regulations are "orders" reviewable under § 402(a) would seem to preclude such a conclusion. We do not understand the Supreme Court to mean that every minatory gesture of the Commission is reviewable under that section.

The next objection is that the Commission did not really find that the forbidden practices worked against "the public convenience, interest, or necessity," but that it rested upon its supposed duty to deny the applications of all who proposed to use their licenses in violation of the Anti-Trust laws. The Commission in one passage of its report does indeed seem so to have understood the statute, though it would scarcely be fair to say that it held as much; but, be that as it may, it did not base its action upon that theory. It made specific findings in the case of each regulation that the contract or the control which it forbade was against the public interest because it took away the stations' free choice without any corresponding advantage to the industry as a whole. Each regulation was a specific exercise of power, addressed to a particular practice which interfered with the most "effective use of radio in the public interest."

The only constitutional objections which we need consider are two: that the standard set by § 303 ("public convenience, interest, or necessity") is too vague; and that the regulations invade the privilege of free speech. Although the Supreme Court has twice at least upheld the standard when applied to the construction of stations or to the allocation of wave lengths (*Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285; [fol. 485] *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 137, 138; (semble) *Panama Refining Co. v. Ryan*, 293 U. S. 388, 428), the plaintiffs insist that it will not serve if used to regulate the business arrangements of a station. We are assuming that when so used it demands the widest practicable variety in the

choice of programs available for broadcasting; that system which will most stimulate and liberate the ingenuity of those who purvey them to the public. There can be no doubt that, if the introductory clause of § 303 will bear that construction the test is definite enough—and indeed peculiarly adapted to the putative proficiency of the Commission in its field. Nor can we see why, when applied to the issue of the licensee's freedom from restraint, the test is not a fair gloss to be imposed upon the clause. It is impossible in a single rubric to specify all the occasions to which it will apply, and the effort at specification is usually abortive for they cannot all be foreshadowed. It is enough if the delegated power be so defined that a clue can be found in it for dealing with the several occasions which may arise. That seems to us to be the situation here.

The argument drawn from the First Amendment, as we understand it, is this. It is true that the regulations do not profess directly to control what programs the stations may broadcast; but they do so indirectly. They do this by forbidding them to make the forbidden contracts with "networks" even though they believe that these will bring them better programs than they can get in any other way; and it is not necessary for a law directly to control the substance of an utterance for it to invade the right of free speech. We agree that the regulations might be invalid though they do not prohibit programs on the basis of their contents; they do fetter the choice of the stations; absolutely free choice would include the privilege of deciding that they preferred the opportunities open to them under the "networks'" contracts to those which would be otherwise available. The Commission does therefore coerce their choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i. e. the interests, first, of the "listeners," next, of any licensees who may prefer to be freer of the "networks" than they are, and last, of any future competing "networks." Whether or not the conflict between these interests and those of the "networks"

and their "affiliates" has been properly composed, no question of free speech can arise.

The last question upon the merits is whether the Commission's findings are so plainly without support in the evidence as to be "arbitrary or capricious," § 402(e); that is, whether the regulations are certain not to promote the "public convenience, interest, or necessity." A majority of the Commission, after a long and painstaking investigation, has concluded that the net result will be to give a larger choice to stations without sensibly diminishing the services of "chain broadcasting," which the report highly commended. We are asked to say that there is no reasonable basis for such a conclusion; to say that no reasonable person [fol. 486] could find in the evidence any support for it. The industry at large holds conflicting views; the plaintiffs on the one hand believe that the prohibitions will in the end destroy "chain broadcasting" altogether; the Mutual Broadcasting System and a number of other interested persons think otherwise. Each side has stated its reasons and the Commission has chosen. It was created to make such choices because Congress believed that it would acquire in its special sphere a skill which courts could not match; and it is now hornbook law that the conclusions of such tribunals are not to be disturbed except in the plainest case. That doctrine applies here with especial force just because the findings are necessarily prospective; time alone can decide their success or their failure. The measure of our power is to say whether there was any substantial evidence that the added freedom given to stations will outweigh the reduction in the opportunities which will remain open to the "networks." We cannot say that there was no such evidence. To take the regulation which is the head and front of the Commission's offending—3.104—it indeed does limit the power of a "network" to furnish large advertisers with the time of all its "affiliates," for it must always run the risk that after its last inquiry a station may have "sold" to another "network" the time which it proposed to "buy" of that station. On the other hand, it is certainly possible that the present contracts give the "networks" so strong a hold upon the industry as to keep down competition which would prove beneficial. Upon such an issue nobody who is not steeped in the details of the business is really entitled to an opinion, and indeed even the opinions of those who are so steeped must be largely speculation.

But that does not mean that the industry must be left to itself; the Commission was created precisely to say how far it was best to let things stand, and how far to intervene.

There remains only the question of procedure: whether a motion for summary judgment is proper, or whether, as the plaintiffs argue, the causes should go to trial and be heard upon evidence taken *de novo.* That depends upon what effect we should give to the Commission's findings. If the plaintiffs intervened in a proceeding by one of their "affiliates" for the renewal of a license, they could not compel the Commission to reconsider the findings of the report. As we have said, they had had adequate notice and full opportunity to be heard; indeed neither of the complaints alleges that they had not. Upon appeal to the Court of Appeals of the District of Columbia under § 402(b), the whole record before the Commission upon the hearings which resulted in the regulations would be part of the record, and the only issues open would be whether there was substantial support for the findings in the record, and whether the findings were "arbitrary or capricious," § 402(e). That record and those issues are before us here. The plaintiffs did not choose to wait and intervene, but adopted the alternative of an action in equity to "set aside" and "annul" the regulations as "orders." The reason that they have been allowed to proceed in this way is that the regulations inflicted a present injury upon them from which they were entitled to present relief; but the determining issues in each case are the same. Congress, having meant the validity of an order refusing a license to be determined as an appeal upon the record made before the Commission, cannot have meant to allow a larger scope of review because the Commission threatens for the same reasons to refuse all licenses.

[fol. 487] This is confirmed by considering what use we could make of any evidence if we took it. It might go to show that the Commission had failed to give adequate notice to the plaintiff of what it proposed, or an adequate opportunity to put in their own evidence, or an adequate hearing upon all the evidence; but aside from the fact that the record is before us and does not bear out such a contention, neither complaint, as we have just said, alleges anything of the kind. On the other hand, if the evidence went to contradict or overthrow the findings, we could not bring it into hotchpot with the evidence taken by the Com-

mission, without deciding the issues in the first instance ourselves. We have no such power; it would upset the whole underlying scheme of an expert commission, whose orders must stand or fall upon such evidence as it had before it. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426. If an aggrieved party wishes to supplement that evidence he must apply to the Commission itself, § 405.

The plaintiffs somewhat faintly invoke the doctrine of *Crowell* v. *Benson*, 285 U. S. 22; *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U. S. 349, and *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38. Assuming that that doctrine is still law (*Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573; S. C. 311 U. S. 570), it does not apply. The "networks" are indubitably engaged in interstate commerce and so are their "affiliates;" it is a question of law, not of fact, whether the regulations are within the Commission's powers, and the only issue of fact, assuming it can be called such, is whether there was evidence to support the findings. Unless the distinction between what is jurisdictional and what goes to the exercise of a power is to disappear altogether, the Commission's jurisdiction did not depend upon whether they rightly estimated the "public convenience, interest, or necessity."

The complaints will be dismissed; and as there has been no trial, we need make no findings. As before, we will grant a stay, this time until February 1, 1943, or until the argument of the appeal in the Supreme Court, whichever is earlier. The same findings which we then made will serve with slight verbal changes. We are filing the judgments, the stays and findings along with this opinion.

Complaints dismissed.

[fol. 488] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., Interveners

ORDER DISMISSING COMPLAINT—November 16, 1942

Before: L. Hand, C. J., and Goddard and Bright, D. JJ.

This cause came on to be heard at the October, 1942 term of this court and was argued by counsel; and thereupon, and upon consideration thereof, it is

Ordered, Adjudged and Decreed that the complaint herein be, and the same hereby is, dismissed on the merits.

Learned Hand, Circuit Judge; Henry W. Goddard, District Judge; John Bright, District Judge.

[fol. 489] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. That if the Federal Communications Commission, pending the plaintiff's appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; the plaintiff will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the

evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two and one half months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to [fol. 490] the plaintiff arising from enforcement, if the conditions mentioned in the First Finding exist.

That the plaintiff is entitled to a stay pending its appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of February, 1943, whichever is earlier.

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

In United States District Court

Decree Granting Temporary Restraining Order

This cause came on to be further heard at the October, 1942, term of this court and was argued by counsel and thereupon, upon consideration thereof, it appearing that the relief herein granted is necessary to preserve the status quo pending an appeal by the plaintiff to the Supreme Court, for the reasons appearing in the Findings of Fact filed herewith, it is

Ordered, Adjudged and Decreed that until February 1, 1943, or the argument of the appeal herein in the Supreme Court of the United States, whichever is earlier, the Federal Communications Commission be and the same hereby is restrained from enforcing those regulations which were issued in their amended form on October 11, 1941, and which [fol. 491] are known as "Order in Docket No. 5060."

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

[fol. 492] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR A DIRECT APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To The Hon. Learned Hand, Circuit Judge for the Second Circuit; The Hon. Henry W. Goddard, District Judge for the Southern District of New York; The Hon. John Bright, District Judge for the said District:

Now comes Columbia Broadcasting System, Inc., plaintiff herein, and feeling itself aggrieved by the final order or decree of the District Court rendered and entered in the above entitled cause on the 16th day of November, 1942, does hereby appeal therefrom to the Supreme Court of the United States because of errors prejudicial to plaintiff which are set forth in the assignment of errors presented and filed herewith, and prays that its appeal be allowed and that citation be issued as provided by law and that the record on appeal be made and certified and sent to the Supreme Court of the United States, in accordance with the rules of that Court.

And your petitioner further prays that an order be made fixing the amount of security which your petitioner shall give and furnish upon such appeal.

John J. Burns, Attorney for Columbia Broadcasting System, Inc.

[fol. 493] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant

THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., Interveners

ORDER ALLOWING APPEAL

The plaintiff herein having filed a petition for appeal to the Supreme Court of the United States from the decree

entered herein on November 16, 1942, and having filed its assignment of errors, it is

Ordered, that an appeal by petitioner in the above-entitled cause to the Supreme Court of the United States from the decree heretofore filed and entered herein on November 16, 1942, be and the same is hereby allowed and that the record on appeal be made and certified and sent to the Supreme Court of the United States in accordance with the rules of that Court, said appeal being hereby made returnable forty (40) days from the date hereof;

Ordered Further, that the bond on appeal, to be approved by this Court, is fixed at the sum of $——.

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

[fols. 494-495] Citation in usual form omitted in printing.

[fol. 496] In United States District Court Southern District of New York

[Title omitted]

Assignment of Errors

Comes now Columbia Broadcasting System, Inc., plaintiff in the above-entitled cause, and files the following assignment of errors upon which it will reply in the prosecution of the appeal to the Supreme Court of the United States herein applied for in said cause from the decree of the statutory three-judge District Court of the United States for the Southern District of New York entered on the 16th day of November, 1942:

1. The Court erred in ruling that the orders of the Federal Communications Commission here involved were within the authority committed to it by section 303 (i) of the Communications Act of 1934 (47 U. S. C. sec. 303(i)).

2. The Court erred in ruling that the orders of the Federal Communications Commission here involved were within the authority committed to it by the Communications Act of 1934, as amended (47 U. S. C. secs. 151-609).

3. The Court erred in failing to rule, as it should have done, that the Federal Communications Commission based

its orders here involved upon an erroneous interpretation [fol. 497] of the extent of its power and duty under the Communications Act of 1934, as amended (47 U. S. C., secs. 151-609), and that such orders should therefore be set aside.

4. The Court erred in failing to rule, as it should have done, that the Communications Act of 1934, as amended (47 U. S. C., secs. 151-609) as construed by the Court is an unlawful delegation of legislative power in contravention of Article I, Section 1 of the Constitution of the United States.

5. The Court erred in failing to rule, as it should have done, that the Communications Act of 1934, as amended (47 U. S. C., secs. 151-609) as construed by the Court is in contravention of the provisions of the First Amendment to the Constitution of the United States guaranteeing freedom of speech and of the press.

6. The Court erred in failing to rule, as it should have done, that the Communications Act of 1934, as amended (47 U. S. C., secs. 151-609) as construed by the Court is in contravention of the due process clause of the Fifth Amendment to the Constitution of the United States.

7. The Court erred in failing to rule, as it should have done, that the orders of the Federal Communications Commission here involved are arbitrary and capricious in that they bear no reasonable or rational relation to the standard of public interest, convenience and necessity provided by the Communications Act of 1934, as amended (47 U. S. C., secs. 151-609) and should therefore be set aside.

8. The Court erred in failing to order, as it should have done, a trial of the cause.

[fol.s 498-506] 9. The Court erred in dismissing the complaint.

10. The Court erred in failing to grant plaintiff's application for a preliminary injunction.

Wherefore, petitioner prays that the final order or decree entered herein on the 16th day of November, 1942, be reversed and for such other and further relief as to the Court may seem just and proper.

John J. Burns, Attorney for Columbia Broadcasting System, Inc.

[fol. 507] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

DIRECTION RE TRANSMISSION OF ORIGINAL DOCUMENTS

It Is Hereby Directed that the original of Exhibit A to the affidavit of Telford Taylor, of November 5, 1941, [fol. 508] be transmitted to the Supreme Court.

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

Agreed to: Jos. T. White, Thomas H. Middleton, David M. Wood, Samuel Brodky, Special Asst. to Atty. Gen., Charles R. Denny, Gen. Counsel F. C. C., Leon Lauterstein, John Burns.

[fol. 509] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

DIRECTION RE TRANSMISSION OF ORIGINAL DOCUMENTS

It Is Hereby Directed that the original of the Exhibit annexed to the affidavit of Frank Stanton, of December 12, 1941, be transmitted to the Supreme Court.

Learned Hand, U. S. C. J.; Henry W. Goddard, U. S. D. J.; John Bright, U. S. D. J.

Agreed to: John Burns, Leon Lauterstein, Atty. for Mutual; Samuel Brodsky, Special Asst. to Attorney General; Charles R. Denny, Gen. Counsel, F. C. C.

[fol. 510] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the United States District Court for the Southern District of New York:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pur-

suant to an appeal allowed in the above-entitled cause and to include in such transcript of record the following, and no other papers and exhibits, to wit:

1. Summons and complaint, together with Exhibits A to F, inclusive, thereto attached;

2. Order dated January 27, 1942, amending complaint; including Federal Communications Commission report on Chain Broadcasting May, 1941, as part of Exhibit B to the complaint;

3. Plaintiff's notice and motion for a preliminary injunction, and affidavits of William S. Paley, with Exhibits A and B thereto attached, and Herbert V. Akerberg, with Exhibits A to T, inclusive, thereto attached, in support thereof;

[fol. 511] 4. Notice of appearance of Federal Communications Commission;

5. Order permitting intervention of Mutual Broadcasting System, Inc.;

6. Stipulation and order granting suspension of Commission's Order;

7. Motion by United States of America and Federal Communications Commission to dismiss the complaint, or in the alternative for summary judgment, and affidavit of Telford Taylor, excluding Exhibit A therein referred to;

8. Affidavit of Fred Weber sworn to December 11, 1941, in opposition to motion for preliminary injunction; with Exhibits A to K, inclusive, thereto attached;

9. Affidavit of Hope H. Barrell, Jr., sworn to December 11, 1941, in opposition to motion for preliminary injunction.

10. Affidavit of Telford Taylor in opposition to plaintiff's motion for preliminary injunction.

11. Plaintiff's additional affidavits:

Affidavit of Kenneth L. Yourd sworn to January 5, 1942, with Exhibit A thereto attached;

Affidavit of Herbert V. Akerberg sworn to January 5, 1942, with Exhibits A to H, inclusive, thereto attached;

Affidavit of Frank Stanton sworn to January 5, 1942, with Exhibit A thereto attached;

Affidavit of Edward Klauber sworn to January 5, 1942, with Exhibits A and B thereto attached;

[fol. 512] Affidavits of Harold C. Read, sworn to January 9, 1942 and November 25, 1941 with Exhibits 1 and 2;

12. Plaintiff's reply affidavit of Frank Stanton sworn to January 10, 1942, with Exhibits A to M, inclusive, thereto attached;

13. Affidavit of Frank Stanton sworn to December 12, 1941, with copy of December, 1941 issue of "Radio Advertising Rates and Data" attached;

14. Petition to expedite reargument and order of District Court noted thereon;

15. Majority opinion of District Court of February 21, 1942;

16. Order of the District Court on the mandate of the Supreme Court;

17. Opinion of the District Court of November 16, 1942;

18. Order or decree of November 16, 1942, dismissing complaint with notation thereon of date of entry;

19. Findings of Fact and conclusion of law in support of order maintaining *status quo* pending appeal;

20. Order maintaining *status quo* until February 1, 1943, or argument of the appeal;

21. Petition for appeal;

22. Assignment of errors;

23. Jurisdictional statement;

24. Order allowing appeal;

25. Citation on appeal;

26. Bond on appeal;

27. Notice of appeal;

[fol. 513] 28. Statement directing attention to provisions of Paragraph 3, Rule 12;

29. Acceptance of service of appeal papers;

30. Stipulation and order directing Clerk to transmit original of Exhibit A attached to affidavit of Telford Taylor of November 5, 1941;

31. Stipulation and order directing Clerk to transmit original exhibit annexed to affidavit of Frank Stanton sworn to December 12, 1941;

32. Praecipe.

Said transcript to be prepared as required by law and the Rules of this Court, and the Rules of the Supreme Court of the United States, and is to be filed in the office of the Clerk of the Supreme Court.

Dated: November 27, 1942.

John J. Burns, Attorney for Columbia Broadcasting System, Inc.

[fols. 514-516] Service of foregoing praecipe accepted and acknowledged this 27th day of November, 1942. The de-

fendant and the interveners waive their right to file a designation of additional portions of the record.

Charles Fahy. Charles R. Denny. Leon Lauterstein.

[fols. 516a-517] [Endorsed:] United States District Court, Southern District of New York. Columbia Broadcasting System, Inc., Plaintiff, v. The United States of America, Defendant. Federal Communications Commission and Mutual Broadcasting System, Inc., Interveners. Civil 16-179. Original. Citation on Appeal. John J. Burns, Attorney for Plaintiff, 40 Wall Street, New York, N. Y. U. S. District Court, S. D. of N. Y. Filed Nov. 27, 1942.

[fol. 518] Clerk's certificate to foregoing transcript omitted in printing.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 519] Supreme Court of the United States, October Term, 1942

No. 555

Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed—Filed December 5, 1942

Comes now the Appellant in the above-entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

1. The Court erred in ruling that the orders of the Federal Communications Commission here involved were within the authority committed to it by Section 303(i) of the Communications Act of 1934 (47 U. S. C. Sec. 303(i)).

2. The Court erred in ruling that the orders of the Federal Communications Commission here involved were within the authority committed to it by the Communications Act of 1934, as amended (47 U. S. C. Secs. 151-609).

3. The Court erred in failing to rule, as it should have done, that the Federal Communications Commission based its orders here involved upon an erroneous interpretation of the extent of its power and duty under the Communications Act of 1934, as amended (47 U. S. C. Secs. 151-609), and that such orders should therefore be set aside.

[fol. 520] 4. The Court erred in failing to rule, as it should have done, that the Communications Act of 1934, as amended (47 U. S. C. Secs. 151-609), as construed by the Court is an unlawful delegation of legislative power in contravention of Article I, Section 1 of the Constitution of the United States.

5. The Court erred in failing to rule, as it should have done, that the Communications Act of 1934, as amended (47 U. S. C. Secs. 151-609), as construed by the Court is in contravention of the provisions of the First Amendment to the Constitution of the United States guaranteeing freedom of speech and of the press.

6. The Court erred in failing to rule, as it should have done, that the Communications Act of 1934, as amended (47 U. S. C. Secs. 151-609), as construed by the Court is in contravention of the due process clause of the Fifth Amendment to the Constitution of the United States.

7. The Court erred in failing to rule, as it should have done, that the orders of the Federal Communications Commission here involved are arbitrary and capricious in that they bear no reasonable or rational relation to the standard of public interest, convenience and necessity provided by the Communications Act of 1934, as amended (47 U. S. C. Secs. 151-609), and should therefore be set aside.

8. The Court erred in failing to order, as it should have done, a trial of the cause.

9. The Court erred in dismissing the complaint.

10. The Court erred in failing to grant plaintiff's application for a preliminary injunction.

[fol. 521] And the Appellant further states that only the following parts of the Record, as filed in this Court, need be printed by the Clerk in the hearing of the case:

1. Summons and complaint, together with Exhibits A to F, inclusive, thereto attached;

2. Order dated January 27, 1942, amending complaint; including Federal Communications Commission report and order on Chain Broadcasting, May 2, 1941 (furnished);

3. Plaintiff's notice and motion for a preliminary injunction, and affidavits in support thereof, including:

Affidavit of William S. Paley sworn to October 30, 1941, with Exhibits A and B thereto attached;

Affidavit of Herbert V. Akerberg sworn to October 29, 1941, with Exhibits A to T, inclusive, thereto attached;

4. Notice of appearance of Federal Communications Commission;

5. Order granting leave to Mutual Broadcasting System, Inc. to intervene;

6. Stipulation and order granting suspension of Commission's order;

7. Motion by United States of America and Federal Communications Commission to dismiss the complaint, or in the alternative for summary judgment, and affidavit of Telford Taylor sworn to November 5, 1941, excluding Exhibit A therein referred to;

8. Affidavit of Harold C. Read sworn to November 25, 1941, with Exhibits 1 and 2 thereto attached;

[fol. 522] 9. Affidavit of Fred Weber sworn to December 11, 1941, in opposition to motion for preliminary injunction, with Exhibits A to K, inclusive, thereto attached;

10. Affidavit of Hope H. Barrell, Jr., sworn to December 11, 1941, in opposition to motion for preliminary injunction;

11. Affidavit of Telford Taylor in opposition to plaintiff's motion for preliminary injunction;

12. Affidavit of Frank Stanton sworn to December 12, 1941, excluding the exhibit annexed thereto;

13. Plaintiff's additional affidavits:

Affidavit of Kenneth L. Yourd sworn to January 5, 1942, with Exhibits A and B thereto attached;

Affidavit of Herbert V. Akerberg sworn to January 5, 1942, with Exhibits A to H, inclusive, thereto attached;

Affidavit of Frank Stanton sworn to January 5, 1942, with Exhibit A thereto attached;

Affidavit of Edward Klauber sworn to January 5, 1942, with Exhibits A and B thereto attached;

14. Plaintiff's reply affidavits:

Affidavit of Frank Stanton sworn to January 10, 1942, with Exhibits A to M, inclusive, thereto attached;

Affidavit of Harold C. Read sworn to January 9, 1942;

[fol. 523] 15. Order of the District Court on the mandate of the Supreme Court;

16. Opinion of the District Court of November 16, 1942;

17. Order or decree of November 16, 1942, dismissing complaint, with notation thereon of date of entry;

18. Findings of fact and conclusion of law relating to decree granting temporary restraining order;

19. Decree granting temporary restraining order;

20. Petition for appeal;

21. Assignment of errors;

22. Order allowing appeal;

23. Citation on appeal;

24. Stipulation and order directing Clerk to transmit original of Exhibit A attached to affidavit of Telford Taylor sworn to November 5, 1941;

25. Stipulation and order directing Clerk to transmit original exhibit annexed to affidavit of Frank Stanton sworn to December 12, 1941;

26. Præcipe;

27. Statement of points to be relied upon and designation of parts of the Record to be printed.

Charles E. Hughes, Jr., Counsel for Appellant.

[fol. 524] Service of the foregoing Statement of Points to be Relied upon and Designation of the Parts of the Record to be Printed is hereby acknowledged this 4th day of December, 1942.

Charles Fahy, by Harry M. Plotkin, Solicitor General of the United States. Charles R. Denny, General Counsel of the Federal Communications Commission. Percy H. Russell, Jr., Attorney for Mutual Broadcasting System, Inc.

[fol. 525] Supreme Court of the United States, October Term, 1942

No. 555

Designation of Additional Portions of Record—Filed December 9, 1942

In addition to the portions of the record designated for printing by appellant, appellee desires that the following parts of the record be printed:

1. Petition to expedite reargument and order of district court noted thereon.

2. Stipulation dated December 8, 1942.

Charles Fahy, Solicitor General of the United States.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing designation is hereby acknowledged this 8th day of December, 1942.

Charles E. Hughes, Jr., Counsel for Columbia Broadcasting System, Inc. Leon Lauterstein, Counsel for Mutual Broadcasting System, Inc.

[fol. 526] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 555

STIPULATION AS TO RECORD—Filed December 9, 1942

Subject to the approval of this Court, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the administrative record before the Commission—Exhibit A to defendants' Motion to Dismiss the Complaint or, in the Alternative, for Summary Judgment—which consists of approximately 9,000 pages and 707 exhibits, need not be printed as part of the record and that any party may refer in the briefs to any portions thereof and may include in an appendix to the briefs such portions of the administrative record as are deemed relevant.

It is further stipulated and agreed that the copy of the December, 1941 issue of "Radio Advertising Rates and Data" attached to the affidavit of Frank Stanton, sworn to December 12, 1941, need not be printed and that any party may refer in the briefs to any portions thereof and may include in an appendix to the briefs such portions thereof as are deemed relevant.

Charles Fahy, Solicitor General of the United States.
Charles E. Hughes, Jr., Counsel for Columbia Broadcasting System, Inc. Leon Lauterstein, Counsel for Mutual Broadcasting System, Inc.

Dated: December 8, 1942.

[fol. 527] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 555

ORDER NOTING PROBABLE JURISDICTION—December 14, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 47,056, D. C. U. S., Southern New York. Term No. 555. Columbia Broadcasting System, Inc., Appellant, vs. The United States of America, Federal Communications Commission, and Mutual Broadcasting System, Inc. Filed November 30, 1942. Term No. 555, O. T. 1942.